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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 69.

ADA ELMIRA HIRST VAN SYCKEL

vs.

JUAN JOSÉ ARSUAGA ET AL.

BRIEF FOR APPELLANTS.

Statement of Facts.

This was a suit in equity begun by appellants, as the heirs of Paul Van Syckel, deceased, by the filing of their bill of complaint in March, 1907, against the defendants composing a mercantile partnership under the style of "Sobrinos de Ezquiaga," and against Paul A. English individually, for the purpose of causing the partition and distribution of the assets of two agricultural partnerships, one being styled "P. Van Syckel and Company," and the other "Santa Cruz Sugar Company," of which latter only was the defendant English a member.

There was no dispute as to the interest of the defendant English, nor as to the proportions of the other parties in the general assets. In fact *the answer denied none of the alle-*

gations of the bill, but appellees by cross-bill asserted that a certain leasehold right existing in the name of Paul Van Syckel, ancestor of complainants, really belonged to the partnership and had been merged in the fee title of the latter. The complainants in turn contended that upon the face of their cross-bill defendants were estopped from any such claim, that its allegations were legally insufficient to sustain such a claim, and that, even if otherwise sufficient, they constituted a fraud in law, from the consequences of which equity will not relieve. The controversy upon this appeal involves solely these questions affecting this leasehold right.

The bill of complaint (Record, pages 1-6) alleged that said firm of P. Van Syckel & Company had been formed in the month of June, 1900, between Paul Van Syckel and the defendant firm of Sobrinos de Ezquiaga, said Van Syckel having contributed to said partnership a certain mortgage upon a plantation called "Santa Cruz," as well as certain real estate and other personal property not material to specify, the total value of which was thirty thousand pesos, provincial money; and Sobrinos de Ezquiaga had obtained its half interest in said partnership assets by paying to Mr. Van Syckel half of the above value, to wit, fifteen thousand pesos in cash. The agreement of partnership was attached as Exhibit "C" to the bill, and is found upon pages 10-14 of the printed record. Under the above agreement this partnership was to continue for the term of two (2) years, but was afterwards extended by the execution of a similar agreement under like terms for the additional period of four (4) years. This supplemental agreement was attached to the bill as Exhibit "D," and is found on pages 14-17 of the printed record.

From the allegations of the bill it appeared that the mortgage upon the plantation "Santa Cruz," so contributed by said Van Syckel to the assets of the partnership of P. Van Syckel & Company, was obtained by him in the following manner:

One Montilla, being the owner of said plantation, which was composed of three hundred and fourteen (314) *cuerdas*

(equivalent to practically the same number of acres), executed three (3) mortgages upon the same, at various dates, amounting in the aggregate to eleven thousand (11,000) pesos, provincial money, in favor of one Marxuach, and also thereafter executed in favor of said Van Syckel a lease for an indeterminate period of time upon all of said plantation except thirty-five (35) cuerdas, which lease was to continue at the option of said Van Syckel, at a stipulated rental of one hundred and five (105) pesos, equivalent to sixty-three (63) dollars in gold, per month.

After the acceptance of said lease, said Van Syckel, in order to make the same recordable under the law, executed a further notarial document whereby he bound himself to continue said lease for a term of at least six (6) years, and said lease was then recorded. (See 1 Castro, Dec. de P. R., 12.)

Thereafter the lessor, Montilla, desiring to rid himself of said lease, entered into a combination with his mortgagee, said Marxuach, whereby the latter was to foreclose his said mortgages in order to eliminate the leasehold right of said Van Syckel, and, after the accomplishment of that object, was to restore the title of the property to said Montilla.

Said Van Syckel thereupon brought suit against both Montilla and Marxuach, setting up the existence and purpose of the combination between them and praying the court to allow him to pay off the said mortgages of Marxuach and upon such payment to be subrogated to him in his mortgage rights, and such relief was granted to Van Syckel in said suit. As a result thereof, the proposed foreclosure of said mortgages was enjoined, and the mortgagee, Marxuach, upon the payment of the amount due him thereunder, in March, 1900, executed an assignment of his said mortgage rights to Van Syckel.

The bill proceeded to allege that at the time the partnership of P. Van Syckel & Company was formed it was agreed between the partners, Van Syckel and Sobrinos de Ezquiaga, that the mortgage rights upon the plantation "Santa Cruz," which he was transferring to form a part of the assets of said

partnership, should be subject to his individual rights under his said lease of the 279 cuerdas thereof; and that, in order that such agreement should be explicitly and solemnly recognized, a notarial instrument was drawn up to that effect and executed on July 27, 1901, by said parties. This instrument was attached to the bill as Exhibit "E" (pages 17-19 of the printed record); and, as its purpose and effect is the principal contention in the case, its pertinent parts deserve quotation here.

After stating the circumstances which authorized one Arsuaga to represent P. Van Syckel & Company, it referred to and described the three mortgages which that firm possessed over "Santa Cruz" and the manner in which said firm had acquired them. It then also described the leasehold right of Van Syckel over the 279 cuerdas. The purpose of the document is then expressed as follows:

> "*Fourth.* And the industrial partnership of P. Van
> "Syckel & Company, represented by its managers,
> "Sobrinos de Ezquiaga, and for and in its name Don
> "Miguel Luis Arsuaga y Garayable, agrees: That all
> "and whatever rights of preference the real rights
> "of mortgage of which review has been made con-
> "stituted over the estate 'Santa Cruz' described have
> "or may have for all cases, including that of judicial
> "claim, all these they postpone to the real right of
> "lease mentioned in favor of Mr. Paul Van Syckel
> "and his successors (causahabientes), renouncing
> "the right which they might have to ask for the re-
> "scission of said lease.
>
> "Mr. Paul Van Syckel, on his part, says that he
> "accepts this document in all its parts."

The bill further alleged that after the execution of the foregoing document—to wit: in September of the same year—Montilla not having paid either principal or interest on said mortgages, said firm of P. Van Syckel & Company, which had become the owner of them upon its formation, as above stated, began suit to foreclose the same, and, as a result of said suit, acquired title to said plantation "Santa

Cruz" by adjudication at the foreclosure sale in default of other bidders, but with the express reservation in said adjudication of the leasehold right still existing in said Paul Van Syckel personally, and that said leasehold right still continued in existence and had been recognized by defendants Sobrinos de Ezquiaga during the existence of said firm of P. Van Syckel & Company.

The bill further alleged the circumstances attending the formation in the year 1905 of the firm called "Santa Cruz Sugar Company" and the nature of its business; but none of these allegations are material to the matters involved in this appeal except the allegation that the articles of agreement of said sugar company, to which both Van Syckel and appellees were parties, provided that it should pay the rental of said plantation "Santa Cruz" "to the firm or corporation entitled thereto" without attempting to identify the parties thereby indicated. It also alleged that both the firm of P. Van Syckel & Company and the subsidiary firm of "Santa Cruz Sugar Company" expired by limitation in the month of June, 1906, unless, indeed, they had been terminated by the death of said Paul Van Syckel in the month of December, 1905. All the documents to which reference was made in the bill were attached as exhibits thereto (pages 7-22).

The bill prayed that said two partnerships might be decreed to have expired by limitation of time, and that the several tracts of land and other assets belonging to said partnerships might be decreed to be partnership property and might be divided between the partners in said partnerships according to their respective shares, or sold if it should be found that no equitable division of the same could be made, but specifying that such division should be subject, so far as concerned the 279 cuerdas included in said lease of Paul Van Syckel, to the leasehold rights of the complainants as his heirs, which it was prayed might be recognized and confirmed.

The bill also prayed for a receivership and an accounting, as well as for general relief, but as no receiver was appointed it is considered that these prayers are not material to the matters involved in this appeal.

In due time Sobrinos de Ezquiaga filed their answer to the foregoing bill of complaint (pages 23-28), by which most of the allegations of said bill were admitted, except those relating to the prayer for the receivership, and no denial was made of the allegations in regard to the continued existence and validity of said lease of 279 cuerdas of said plantation "Santa Cruz" to said Paul Van Syckel, the ancestor of the complainants.

At the same time said defendants filed their cross-bill, with exhibits (pages 28-49), wherein many of the allegations of the original bill were reaffirmed, but it was alleged that at the time of the formation of the firm of P. Van Syckel & Company and the transfer of the mortgages upon said plantation "Santa Cruz" by said Paul Van Syckel to the firm of P. Van Syckel & Company, "it was intended by him and understood between him and defendants, Sobrinos de Ezquiaga, and such was the basis and consideration of the articles of partnership above referred to, that said firm of P. Van Syckel & Company should acquire all of the rights and title of every kind and character, whether as mortgagee or lessee, which the said Van Syckel had or might have in and to the said 'Santa Cruz'" (page 28).

The cross-bill proceeded to allege that at that time the said Montilla, the original owner of the property, was complaining of the assignment of the mortgages from Marxuach to Van Syckel, and was threatening legal proceedings to annul such transfer as well as said lease to Van Syckel, and that upon the advice of one Acuña, who was during all of the time referred to acting as the attorney both for Van Syckel personally, the firm of P. Van Syckel & Company, and defendants Sobrinos de Ezquiaga, it was agreed between said firm of P. Van Syckel & Company and said Van Syckel personally that, in order to provide against the contingency

of the payment of said mortgages by Montilla or the annulment of the transfer thereof from Marxuach to Van Syckel, efforts should be made to establish the existence of said lease in favor of Van Syckel, and in that manner to enable Van Syckel or said firm to continue in the use and possession of "Santa Cruz" under said lease in the event that said firm should not be able to foreclose said mortgages and thus acquire the title in fee to said plantation; and that it was upon such advice, and for such reason only, that said Van Syckel and the said firm of P. Van Syckel & Company entered into and executed the notarial agreement whereby the rights of said firm under their mortgages were postponed or subordinated to the rights of Van Syckel under his said lease. It was further alleged that it was, however, understood and agreed between the parties thereto *at the time of its execution* that this notarial agreement:

> "Should in no way, as between the said parties, " affect the unrestricted and unlimited rights which " the said P. Van Syckel & Company should or " might be entitled to in and to said Hacienda 'Santa " Cruz' by virtue of the assignment to the said firm " of the said mortgages, and of the subsequent fore- " closure thereof, as was intended and contemplated " by the said Paul Van Syckel and the said P. Van " Syckel & Company."

And that:

> "The said firm of P. Van Syckel & Company " should proceed as promptly as possible to the fore- " closure of the said mortgage, and should bid in the " said Hacienda 'Santa Cruz' at the mortgage fore- " closure sale, and inscribe the title thereof in its " own name free from all claims, rights or interests " of the said Paul Van Syckel."

Said cross-bill further alleged that it was in accordance with such agreement that said firm of P. Van Syckel & Company began its suit to foreclose said mortgages, and under the foreclosure sale the said plantation was adjudicated to

P. Van Syckel & Company without any limitation or reservation whatsoever in favor of said Van Syckel, or any other person; that said Van Syckel had full knowledge of and consented to the result aforesaid, and that there resulted therefrom under the laws of Porto Rico a merger or confusion of rights by reason of which said lease no longer existed.

In further explanation of the alleged non-existence of said lease, paragraph IV of said cross-bill contains the following allegations (page 30):

> "Defendants say that notwithstanding the acquisition by P. Van Syckel & Company absolutely of the said Hacienda 'Santa Cruz,' as aforesaid, the said firm, by agreement with the said Paul Van Syckel, and upon the advice of their said attorney, found it necessary, or advisable, apparently to recognize the supposed existence of the said lease, but defendants say this was done upon the advice of counsel, as above stated, for the purpose of successfully defending the action which was instituted by the said Emilio Montilla against P. Van Syckel and Company and José E. Marxuach on the fifth day of December, 1902, in the District Court of San Juan, for the purpose of annulling the transfer of the said mortgage to Van Syckel, and subsequently by him to P. Van Syckel and Company insofar as relates to the contribution by the said Paul Van Syckel to P. Van Syckel and Company of the said mortgage; and to secure a decree that neither Paul Van Syckel nor P. Van Syckel & Company had been legally in possession of said mortgage of Montilla, or that they had ever been subrogated to the mortgage rights of Marxuach; that P. Van Syckel and Company, by said supposed assignment, acquired only a personal action against Montilla for the amount of the said mortgage; also to set aside and annul the mortgage foreclosure proceedings aforesaid and the adjudication thereof to P. Van Syckel & Company.
>
> "It was agreed and understood between Paul Van Syckel and the said firm of P. Van Syckel and Company that the latter would avail itself of the

"said lease and that the same should be recognized "in existence by either of the said parties only in the "event that the said suit of Montilla should be successful and in that event that P. Van Syckel & Company should be deprived of the dominion owner- "ship of the Hacienda 'Santa Cruz,' which it had acquired by virtue of the said foreclosure proceedings."

Said cross-bill then further alleges that said Van Syckel at no time after the execution of said notarial agreement subordinating the mortgage rights of P. Van Syckel & Company to his leasehold rights made any claim that he was entitled to said leasehold, but, on the contrary, recognized and respected the absolute rights of said partnership as the sole and exclusive owner of said plantation except for the purposes above stated in paragraph IV, and that said P. Van Syckel & Company had with the knowledge and express authority of said Van Syckel leased said "Santa Cruz" at various times, and had collected the entire rent therefor; and it was further alleged that the partnership agreement of May 26, 1902, by which said firm of P. Van Syckel & Company was extended for four years, recognized and affirmed the non-existence of said lease, because it stated that said plantation formed a part of the capital of said partnership, and no reference was therein made to any claim or lease by the said Van Syckel as against the said plantation.

Said cross-bill therefore prayed the court to decree that said lease of Montilla to Van Syckel of said 279 cuerdas of said plantation "Santa Cruz" was no longer in existence or of any force or effect; that all the rights of said Van Syckel as lessee or mortgagee were transferred by him to and vested in said partnership, and that said partnership was the absolute owner of said plantation without any reservation in favor of said Van Syckel by reason of said lease.

To this cross-bill the complainants in the original bill filed their demurrer (pages 49-50) upon the general ground

of want of equity, and also upon the ground that the allegations of said cross-bill showed that the complainants therein did not come into court with clean hands with respect to the transaction from which they prayed to be relieved, as they averred that the same was not in its inception *bona fide*, but was a mere simulation and fiction to which they were parties.

This demurrer was overruled by the trial court (page 50). The original complainants, the defendants in the cross-bill, thereupon answered it, denying all its allegations respecting any agreement or understanding that the said notarial agreement subordinating the rights of the mortgagees to the rights of Van Syckel as lessee was not what it upon its face purported to be, and alleging that the reason why no mention was made of said lease in the articles of agreement extending the partnership of P. Van Syckel & Company was that the foreclosure suit by which the mortgage credit existing as an asset of the firm when originally constituted had been converted into a fee title to said property in no way affected said leasehold right (pages 51-53).

Replications having been filed to the respective answers to the bill and cross-bill, and evidence having been taken upon the respective issues therein involved, the trial court on the 31st day of July, 1908, rendered its opinion and decision, holding the complainants entitled to the distribution of the assets of said firms of P. Van Syckel & Company and Santa Cruz Sugar Company, but that the cross-complainants were entitled to the relief prayed for in their cross-bill, to the effect that the leasehold rights of complainants in the 279 cuerdas of the plantation "Santa Cruz" no longer existed and that the same should be canceled (pages 54-65).

In accordance with this opinion a preliminary decree was entered under date of August 7, 1908 (pages 65-68), and findings of fact and conclusions of law drawn up (pages 69-84). Certain rulings upon the admission and exclusion of

evidence were also included at the request of the appellants (pages 84-89). Thereafter a commissioner was appointed to have the lands involved surveyed and report to the court whether a partition in kind could be made without impairing their value, and, in case he reported in favor of division, to recommend one or more plans for such division. The report of the commissioner was in favor of partition in kind and a plan of partition was suggested (pages 94-99). Upon that report the court rendered its "partial final decree" indicating in general language the partition to be made, directing the appointment of a surveyor "to establish the boundaries" (page 100). Thereafter the surveyor filed his report and counsel for defendants moved the court for a further decree expressly approving the report of the commissioner, approving the plans which had been filed by the surveyor and directing the execution of the proper deeds between the parties. Upon that motion a further decree was entered in conformity with its prayer (pages 101-3), and thereafter upon the further motion of defendants the same was in some respects modified (pages 103-5).

Appellants originally appealed from the decree of August 7, 1908, believing that to be final in its character (pages 89-93); but this court, upon its own motion, dismissed that appeal because that decree was not considered final (220 U. S., 601). Whereupon appellants took a second appeal from the two subsequent decrees of May 15 and June 10, 1909, above described (page 105). This appeal was duly allowed (page 106) and the citation issued and served (pages 108-9).

In order that the sequence of the pertinent events involved in the questions now before the court may appear in clear and convenient form, we append the following chronological statement:

June 23, 1897.—Van Syckel obtained his lease from Montilla for 279 cuerdas of the plantation "Santa Cruz," to continue an indeterminate

period, which was recorded as the fourteenth inscription affecting said property.

March 16, 1900.—Three mortgages, aggregating 11,000 pesos, Mexican money, previously existing as a lien upon the whole 314 cuerdas of said plantation, were assigned to Van Syckel and assignment recorded as the fifteenth inscription.

June 1, 1900.—Partnership of P. Van Syckel and Company formed, by which Van Syckel assigned said mortgage liens to said firm as a part of the assets contributed by him, recorded as the seventeenth inscription (a lease of 35 cuerdas of the same property to one Gutierrez del Arroyo having been recorded as the sixteenth).

January or February, 1901.—Van Syckel went to live in Havana.

July 27, 1901.—Contract between Van Syckel and P. Van Syckel & Company, whereby the latter's rights under the mortgages were subordinated to Van Syckel's rights under his lease, recorded as the eighteenth inscription.

September 11, 1901.—Suit to foreclose said mortgage liens by summary process begun by P. Van Syckel & Company.

November 27, 1901.—Adjudication of the plantation "Santa Cruz" to P. Van Syckel & Company in said summary foreclosure proceedings, subject to the continued existence of the lease of 279 cuerdas to Van Syckel individually.

May 26, 1902.—Renewal of partnership agreement of P. Van Syckel & Company for four years.

December 5, 1902.—Suit begun by Montilla against both Van Syckel and P. Van Syckel & Company to annul all these transactions, including the lease to Van Syckel.

March 17, 1905.—Decision in said suit on Montilla's appeal to the Supreme Court of Porto Rico affirming the court below in denying his contentions and sustaining, among other things, the validity of Van Syckel's lease (Castro's Decis- validity of Van Syckel's lease (8 Pr. Rep., 153.)

Appeal taken by Montilla to this court.

August 22, 1905.—Partnership of "Santa Cruz Sugar Company" formed.

December 27, 1905.—Paul Van Syckel died in Havana.

December 30, 1905.—Montilla suit settled and appeal abandoned.

Upon the record as thus constituted the appellants appear before this court and ask its consideration of the following

Assignment of Errors.

I.

The court erred in overruling the demurrer filed by appellants on the 15th day of June, 1907, to the cross-bill of appellees, Sobrinos de Ezquiaga.

II.

The court erred in concluding as matter of law from its findings of fact that the contract of lease executed on the 23d day of June, 1897, between Montilla and Van Syckel was at the time of said decree without legal force or effect and had ceased to exist.

III.

The court erred in concluding as matter of law from its findings of fact that the leasehold rights previously existing in said Paul Van Syckel were merged in the free title to said plantation, "Santa Cruz," acquired by the firm of P. Van Syckel & Company by virtue of the adjudication to it in the foreclosure suit against Montilla and as a result of their agreement set forth in said findings of fact, executed between said Paul Van Syckel and P. Van Syckel & Company.

IV.

The court erred in concluding as matter of law from its findings of fact that the deed of postponement executed on the 27th day of July, 1901, by Paul Van Syckel and P. Van Syckel & Company was at the time of said decree without legal force or effect as between the parties to this suit.

V.

The court erred as matter of law in concluding that appellees, Sobrinos de Ezquiaga, were entitled to the relief prayed for in their cross-bill.

VI.

The court erred in concluding as matter of law that said firm of P. Van Syckel & Company was the owner of said plantation "Santa Cruz" free from any claim on the part of appellants by virtue of said contract of lease (inserted in finding of fact numbered 2) in connection with the agreement subordinating the mortgage rights of said firm to said leasehold interest of Van Syckel (inserted in finding of fact numbered 8).

VII.

The court erred in concluding as matter of law that appellants were estopped from asserting their rights under said lease.

VIII.

The court erred in admitting certain testimony of Eduardo Acuña Aybar, a witness produced and examined on behalf of the appellees, Sobrinos de Ezquiaga, which testimony, together with the questions propounded to said witness which elicited the same, was as follows:

"Q. Now, Mr. Acuña, after you had given certain advice about the method of defending by both Paul Van Syckel personally and Van Syckel & Company against Montilla, what did Mr. Van Syckel do or say with respect thereto?

"A. He followed absolutely my advice and the lease of the 'Santa Cruz' estate remained standing purely as a means of defense against the suits of Montilla.

"Q. Did Mr. Van Syckel say anything to you with respect to the cancellation of the lease?

"A. Yes, sir; on several occasions he spoke to me about the subject of canceling the lease and I advised *on* (to) the contrary, because that lease was the means of defense against any suits that Montilla might bring during his lifetime; that that lease was entirely fictitious."

In support of our contention that the foregoing errors were committed by the court below, and that the decision of the court below should be reversed, we present the argument and citations which follow.

ARGUMENT.

POINT ONE.

The Demurrer of Appellants to the Cross-bill Should Have Been Sustained.

The court will bear in mind that the orginal bill of appellants had for its object the distribution of the assets of two partnerships, which had probably been dissolved in law by the death of Paul Van Syckel before the time limited for their duration by the partnership agreements, but which had been admittedly dissolved by the expiration of said time limit before appellants' bill was filed; hence the question as to which event worked the dissolution becomes immaterial. In alleging what were the assets of the partnership P. Van Syckel & Company the bill set up that a part of those assets originally had been certain mortgages upon a plantation called "Santa Cruz;" that during the existence of the partnership these mortgages had been foreclosed and, as a result of such foreclosure, adjudged to said partnership in payment of the debt, whereby it had become the owner of the fee title to the same; but that at the time of such foreclosure said Paul Van Syckel had a recorded lease to 279 cuerdas of said plantation (that is, all of it except 35 cuerdas) which was subsequent in date to said mortgages, but which by agreement made at the time of the formation of said partnership was to be given priority over them; that said agreement was subsequently, on July 27, 1901, evidenced by a solemn notarial document, which was made Exhibit "E" to the bill (page 17 of the printed record); and that the decree of adjudication recognized the priority of this lease. The complainants simply asked that this instrument be taken and considered for what it purported to be upon its face in determining the assets of the partnership for division.

Although defendants in their answer to the bill *denied none of the foregoing averments*, they filed a cross-bill which alleged that this notarial document of July 27, 1901 (which is sometimes called in the record the "Agreement of Postponement of Right") had been executed upon the advice of counsel in order that it might have certain effects in litigation which was anticipated with Montilla, the original owner of the plantation referred to, and that it never had had, nor was intended to have, any force or effect between the parties thereto. It was, therefore, prayed that it might be declared void and of no force or effect and be canceled in the Registry of Property.

We ask the attention of the court to some of the specific allegations of this cross-bill, to wit (page 29):

> "Upon the advice of the said attorney it was "agreed by and between the said P. Van Syckel and "Company and the said Paul Van Syckel personally "that to provide against the contingency of the pay- "ment of the said mortgage by the mortgagor Mon- "tilla, or of the annulment of the transfer thereof "from Marxuach to the said Paul Van Syckel, ef- "forts should be made to establish the existence of "the said lease, so that in the event that the said firm "of P. Van Syckel & Company should not be able "to foreclose the said Montilla mortgage, and thus "acquire the dominion title to said Hacienda 'Santa "Cruz,' it would be in a position to continue in the "use and possession of the said hacienda by virtue "of the lease aforesaid.
>
> "Acting upon this advice of the said attorney, and "for such reason only, the said Paul Van Syckel and "the firm of P. Van Syckel and Company entered "into the agreement of the twenty-seventh of July, "1901, before the Notary Santiago R. Palmer, in "the city of San Juan, being Exhibit 'E' attached "to the bill of complaint."

At this point we are moved by curiosity to ask: How could this agreement possibly have the effect suggested? If

Montilla had *paid off* the mortgages their lien would have been extinguished, the rights of Van Syckel under the lease would have remained unaffected, and, if he had agreed to assign the lease to the partnership, that could be done. If, on the other hand, Montilla had by suit succeeded in annulling the transfer of the mortgages from Marxuach to Van Syckel, any agreement which Van Syckel, or his assignees, P. Van Syckel & Company, might have made affecting the lien of those mortgages while claiming to be owners of them would be as null as the transfer upon which their claim was founded—and the conspirators (if they were such) would find themselves exactly where they were before any such postponement of right had been executed.

Then the acute pleader concludes:

> "So that, in the event that the said firm of P. Van
> "Syckel & Company should not be able to foreclose
> "the said Montilla mortgage, * * * it would be
> "in a position to continue in the use and possession
> "of said hacienda by virtue of the lease."

But would it? If in any manner Montilla could have obtained a decision or decree that the assignment of said mortgages to P. Van Syckel & Company, and hence the latter's claims under them, were a nullity, by the same decision or decree the nullity of their attempt to postpone (that is, to subordinate) the lien thereof to that of the lease would have followed as a necessary incident and result, and the priority of the mortgages would have been restored.

But let us read further from the same paragraph of the cross bill:

> "It was agreed and understood, however, at the
> "time between the said Paul Van Syckel and the
> "said firm of P. Van Syckel & Company that this
> "agreement should in no way as between the said
> "parties affect the unrestricted and unlimited rights
> "which the said P. Van Syckel & Company should,
> "or might, be entitled to in and to the said Hacienda

"'Santa Cruz' by virtue of the assignment to the said "firm of the said mortgage and of the subsequent "foreclosure thereof, as was intended and contem- "plated by the said Paul Van Syckel and the said "P. Van Syckel & Company."

In other words, notwithstanding the execution of this solemn public instrument, the parties thereto should stand to each other in exactly the same relation as they had stood before its execution. In further affirmation of this, we find the following in paragraph IV (page 30):

"Defendants further say that notwithstanding the "acquisition by P. Van Syckel & Company abso- "lutely of the said Hacienda 'Santa Cruz,' as afore- "said, the said firm, by agreement with the said Paul "Van Syckel and upon the advice of their said at- "torney, found it necessary, or advisable, apparently "to recognize the supposed existence of the said lease, "but defendants say that this was done upon the ad- "vice of counsel, as above stated, for the purpose of "successfully defending the action which was insti- "tuted by the said Emilio Montilla against P. Van "Syckel & Company and José E. Marxuach on the "fifth day of December, 1902, in the District Court "of San Juan, for the purpose of annulling the trans- "fer of the said mortgage to Van Syckel, and subse- "quently by him to P. Van Syckel & Company, to "annul the formation of the articles of partnership "of P. Van Syckel and Company in so far as related "to the contribution by the said Paul Van Syckel to "P. Van Syckel & Company of the said mortgage, "etc. * * *

"It was agreed and understood between Paul Van "Syckel and the said firm of P. Van Syckel and "Company that the latter would avail itself of the "said lease and that the same should be recognized "in existence by either of the said parties only in the "event that the said suit of Montilla should be suc- "cessful and in the event that P. Van Syckel & Com- "pany should be deprived of the dominion ownership "of the Hacienda 'Santa Cruz,' which it had ac- "quired by virtue of the said foreclosure proceed- "ings."

That is, the "supposed existence of the said lease" was to be recognized for the sole purpose of deceiving other interested persons and the courts of justice. This is made even plainer by the allegations of paragraph VII, to wit (page 32):

> "Defendants say that while it is true that in the "said articles of association of the Santa Cruz Sugar "Company it was provided that the said Santa Cruz "Sugar Company should pay the sum of one hun- "dred seventy-five dollars ($175.00) monthly rental "to the person or corporation who should be entitled "thereto, defendants say that this clause was placed "in the said agreement for the reasons hereinbefore "expressed, and because of the fact that the said "firm of P. Van Syckel & Company expected that the "said Emilio Montilla y Valdespino would appeal "from the judgment of the Supreme Court of Porto "Rico rendered on the seventeenth day of March, "1905, and because it was the purpose and under- "standing of Paul Van Syckel and of P. Van Syckel "& Company to *preserve the fiction of the said lease* "until such time as the said judgment or decree of "the Supreme Court aforesaid should become final "and effective." (Italics ours.)

We, therefore, think it may be fairly said that the appellees, complainants in the cross-bill, were thereby asking the court to grant them relief from the effects of an instrument which was by themselves alleged to be fictitious and fraudulent in its inception and executed solely for the purpose of deceiving others interested in the property, and especially the courts of justice.

The demurrer of appellants to this cross-bill (page 49) was upon three grounds, which may be stated as two: (*a*) that complainants in the cross-bill did not thereby show themselves entitled to equitable relief of any kind, and (*b*) that said cross-bill showed upon its face that they did not come into the court of equity with clean hands because of the admissions above quoted.

(a) Cross-bill Showed No Right to Equitable Relief.

In considering this ground of demurrer, we submit that the court below was not only at liberty but was under the obligation to consider not only the averments of the cross-bill itself, but also the contents of the exhibits filed therewith or referred to therein and the effect of the decisions of the Supreme Court of Porto Rico, which were by reference made a part of paragraphs II and VII and alleged to support the contentions of appellees, at least in so far as such matters appeared from the exhibits and the published report of the latter decision of which the court might take judicial notice. Let us now examine the cross-bill in connection with its exhibits and this decision.

(1) In paragraph I (page 28) it is alleged that:

> "Upon the assignment and transfer of the said "mortgage from the said Van Syckel to the firm of "P. Van Syckel & Company it was intended by him "and understood between him and defendants So- "brinos de Ezquiaga, and such was the basis and "consideration of the articles of partnership above "referred to, that the said firm of P. Van Syckel & "Company should acquire all of the rights and title "of every kind and character, whether as mortgagee "or lessee, which the said Van Syckel had, or might "have, in and to the said Hacienda 'Santa Cruz.'"

Yet the articles of partnership themselves, which were in the form of a notarial document and were attached to the same cross-bill as Exhibit No. 1 (page 33) expressly state and show that all that Van Syckel assigned or pretended to assign to the partnership respecting "Santa Cruz" were the mortgage credits, amounting with interest to the sum of 11,697.65 *pesos*, of which the history, and even the book and page of their registry, are specified (page 34).

(2) The remainder of said paragraph I is devoted to allegations as to the intentions and oral agreements of the parties with respect to this instrument of "postponement of

right," which was executed on July 27, 1901. Yet the law of evidence then, and now, in force in Porto Rico (Acts of the Legislative Assembly of Porto Rico, 1905, page 73) contained the following provisions:

> SECTION 25. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> 1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> 2. Where the validity of the agreement is the fact in dispute.
>
> But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 28, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term "agreement" includes deeds and wills, as well as contracts between parties.
>
> SECTION 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of those whose language he is to interpret.
>
> SECTION 101. The following presumptions, and no others, are deemed conclusive: * * * 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration. * * *

Under the allegations referred to no question was made of a mistake or imperfection in the writing, nor of the validity of such an agreement as they had made; nor was their purpose confined to an explanation of the circumstances of the parties, or of the situation of the subject, or of any ambiguity; nor was any illegality or fraud alleged

except their own joint intent to deceive others. On the contrary, their voluntary execution of the instrument with knowledge of its consequences was averred, and the attempt was to aver and have the court act upon an alleged intention and oral agreement that the written contract should be without force or effect between the parties thereto. We submit that such allegations set forth matters which the law does not permit to be proven, and afford no ground for relief either at law or in equity.

(3) Paragraph II of the cross-bill referred to the suit brought by P. Van Syckel & Company to foreclose these mortgages which had been assigned to them by Van Syckel, and alleged that, as a result of that suit, "the said hacienda was awarded and adjudicated to the said P. Van Syckel & Company without any limitation or reservation whatsoever in favor of the said Paul Van Syckel or any other person" (page 30).

Yet the same paragraph referred to the judgment in that case and made it a part of the bill as Exhibit No. 2; and, upon turning to that exhibit, we find the following paragraphs therein (italics ours):

> "It appearing by instrument executed on the
> "twenty-third day of June of eighteen hundred and
> "ninety-seven, before the notary Don Mauricio
> "Guerra, Don Emilio Montilla *entered into a con-*
> "*tract of lease* with Don Pablo Van Syckel y Paul
> "of the plantation 'Santa Cruz' deducting therefrom
> "thirty-five cuerdas which he had previously leased
> "to Don Rafael Gutierrez del Arroyo, *by virtue of*
> "*which contract the said Van Syckel received the*
> "*said property as lessee*, binding himself to pay as
> "rent therefor the amount of two hundred and five
> "pesos, provincial money; it being one of the con-
> "ditions of that stipulation that, there being no
> "time fixed for the expiration of said contract, the
> "same shall endure and *the owner would be bound*
> "*to respect the same so long as the lessee should*
> "*comply with the payment of the monthly rent*,
> "and said instrument was recorded, as to two hun-

"dred and seventy-nine cuerdas of the property "leased, at folio two hundred and fifty-nine, over, "of volume eleventh of Bayamón, property number "seventy-nine, registration fourteenth;" * * * (page 41).

"It appearing that by another instrument executed "on the twenty-seventh day of July of the current "year the firm of P. Van Syckel and Compañia, as "mortgage creditor, and Don Pablo Van Syckel y "Paul, as lessee of the property 'Santa Cruz,' *entered "into an agreement under which any and all rights "of prelation of the three mortgage credits* repre- "sented by the former, on account of their dates, "*were thereby postponed to the real right of lease* "which the other party Van Syckel has in his favor, "*the former having made express waiver of such "rights as it may have to ask for a rescission of the "contract of lease*, which said agreement was re- "corded at folio two hundred and thirty-seven, over, "of said volume eleventh, registration eighteenth;" * * * (page 42).

The said judgment then proceeded to enumerate the different recorded liens existing against said plantation, and, after the description of several not material here, continued as follows:

"By the mortgage credits for eleven thousand "Mexican pesos in favor of the first claimant, hav- "ing, in addition, as later liens, a cautionary notice "of the suit brought by Doña Dolores Gutierrez del "Arroyo against the defendant in a declaratory ac- "tion for performance of a contract and execution "of a mortgage instrument, set forth in entry 'B' "and at folio fifty-seven, over, of volume nineteen "of Bayamón, and

"By a real right of lease constituted in favor of "Don Rafael Gutierrez del Arroyo on thirty-five "cuerdas of the property hereinabove described, "stated in registration sixteenth of the same" (page 43).

The description of the three mortgages which aggregated the 11,000 pesos found at the beginning of said judgment (page 40) recites that the record of the same constituted, respectively, the ninth, tenth, and eleventh registrations referring to said plantation in the Registry of Property, and the paragraphs which have been quoted show that the lease to Van Syckel was the fourteenth registration, and the lease to Gutierrez del Arroyo was the sixteenth. Hence it is seen that the lease to the latter was subject to be extinguished by the sale under the mortgages, as would have been the lease to Van Syckel but for the agreement of July 27, 1901.

The same Exhibit No. 2 further showed (page 44) that, subsequent to the original judgment from which the above quotations have been made, the attorney for P. Van Syckel & Company filed a petition asking the court to issue a copy of that judgment, translated as "the writ of adjudication," and also of a supplemental order which he asked for, in order that the proper entries might be made in the Registry of Property. This petition was granted, the part of the order here material being as follows:

> "Let notice be served upon Mr. Paul Van Syckel "or on his legal representative Don José B. Arsuaga "of the adjudication of the property made in favor "of P. Van Syckel & Company *for the purpose of* "*the contract of lease* entered into by the former "with the debtor Montilla, and let the firm of P. "Van Syckel and Company be put in possession of "the thirty-five cuerdas of land belonging to the "said plantation and which appear as possessed by "Don Rafael Gutierrez del Arroyo as lessee thereof, "with notice of such possession to the said Gutierrez "del Arroyo" (page 45).

In view of this language, there is no escaping the conclusion that by this judgment the document of "Postponement of Right" was not only recognized but enforced; that Van Syckel was left in possession under his lease, being notified of the adjudication so as to be advised to whom the rent

should be paid; and that Gutierrez del Arroyo was foreclosed of his rights and ordered to turn the possession of his thirty-five cuerdas over to P. Van Syckel & Company. Why this result followed with respect to Gutierrez, and would have followed with respect to Van Syckel save for the document aforesaid, is seen from the provisions of the Civil Code of 1889, then in force in Porto Rico, of which one section reads as follows:

> "Art. 1571. The purchaser of a leased estate has a "right to terminate the lease in force at the time of "making the sale, unless the contrary is stipulated, "and the provisions of the mortgage law."

Section 1474 of the Civil Code of 1902, in force at the time of the foreclosure and adjudication, has an identical provision.

We think we have made plain that this exhibit emphatically disproved the allegation of the cross-bill itself above quoted, that the plantation had been adjudicated to the partnership "without any limitation or reservation whatsoever in favor of the said Paul Van Syckel," and showed affirmatively that such a *reservation had been made*.

(4) The same exhibit also contradicted the allegations of paragraph III of the cross-bill (page 30) in case its allegations are to be taken in the sense that the phrases "taking of the title to the said property absolutely" and "to become the absolute owner of said property" mean free from the rights of Van Syckel under his lease.

(5) Paragraph IV of the cross-bill (page 30) admits the subsequent recognition of the lease by P. Van Syckel & Company, but alleges that it was a simulated recognition for the purpose of defending against Montilla; while the first part of paragraph V (page 31) alleges that Van Syckel never made any claim under the document of "Postponement of Right" after it was executed, nor did he pay any rent to P. Van Syckel & Company. But as he was admittedly the owner of a half interest in that firm, and there is

no allegation that any liquidation of accounts or profits was made, surely such allegations are not sufficient to overcome a solemn instrument.

(6) Paragraph VI of the cross-bill alleged the admitted fact that the firm of P. Van Syckel & Company, after the foreclosure of the mortgages and the adjudication of the plantation to them, extended its copartnership for a further term of four years under amended articles which conformed to the change in the character of that part of its assets from a mortgage right to the ownership of the property itself. The only further allegation is that "no reference is made in such extension of the articles of partnership of May 26, 1902, to any claim or lease by Paul Van Syckel as against the Hacienda 'Santa Cruz.'" This can hardly be convincing, or even important, when it is remembered that neither was any such mention made in the first articles, although the leasehold right is admitted to have existed up to that time.

Taking this allegation in connection with the allegation of paragraph I, that Van Syckel transferred to the firm when first formed his rights of lease as well as his mortgage rights, although the former were not mentioned, we have this remarkable contention: The leasehold rights *were included* in the first partnership, *although* they were not *mentioned;* those rights *did not exist* at the time of the second partnership *because* they were *not mentioned*. It is not upon such inconsistent propositions that equity should grant relief.

(7) Paragraph VII of the cross-bill merely admits an allegation of the original bill that the articles of the Santa Cruz Sugar Company simply provided for the payment of its rental to "the person or corporation who should be entitled thereto," without specifying who that person or corporation might be, and tries to avoid the suggested conclusion therefrom by repeating the story of attempted protection in pending litigation and "to preserve the fiction of the said lease."

We have now reviewed each paragraph of the cross-bill

much waste paper. As we understand it, courts will not hear parties so stultify themselves.

Waldon *vs.* Skinner, 101 U. S., 577, 584;
Brown *vs.* Slee, 103 U. S., 828, 838;
Assurance Company *vs.* Building Association, 183 U. S., 308, 318;
Simpson *vs.* U. S., 198 U. S., 397, 398.

The above cited case of Brown *vs.* Slee was one quite similar to the case at bar, with the variation that the contract in controversy had been made by the surviving partner of a partnership with the executors of the deceased partner instead of with that partner himself. The surviving partner, by cross-bill in the suit which the executors had brought to compel performance of the contract, set up a verbal understanding contemporaneous with and contrary to the written terms. This court said:

> "The averments of Brown as to the obligations of the estate are contradicted by the terms of the written instrument to which he refers, and on which the rights of the parties depend. There is no allegation of fraud or mistake in reducing the contract to writing. It follows that the demurrer to the cross-bill was properly sustained."

We have already cited the Law of Evidence in Porto Rico applicable to present circumstances (*ante*, pages 21-22). The doctrine of estoppel is also applicable. The general rule has been clearly stated for this court by Mr. Justice Brown:

> "It may be laid down as a general proposition "that where a party assumes a certain position in "a legal proceeding and succeeds in maintaining "that position, he may not thereafter, simply be- "cause his interests have changed, assume a con- "trary position, especially if it be to the prejudice "of the party who has acquiesced in the position "formerly taken by him."
>
> Davis *vs.* Wakelee, 156 U. S., 680, 689.

and have shown the contradiction between some of them and the exhibits attached thereto, and the legal futility of others, even were the allegations true in fact. The net result is, we submit, an attempt to contradict and destroy a solemn written instrument by an alleged contemporary oral understanding. To substantiate this understanding a certain motive is stated, and certain facts are alleged to be apparent from records, which records are also made part of the pleading. If the foregoing analysis has shown that the motive as alleged would have been a vain one, by no possibility affecting the rights of Van Syckel and P. Van Syckel & Company as against Montilla or third parties, and that the contents of the exhibits themselves disprove the understanding alleged, it logically follows that the document of "Postponement of Right" was not a fiction, but made for the very purpose appearing on its face—its effect on the rights of the parties as between themselves, and that the claim of its being a fiction has had its origin since the death of Paul Van Syckel removed one of the principal actors from the scene.

Another reason why the court below should have sustained the first and second grounds of demurrer to this cross-bill is that, even conceding all the allegations of the bill to be true as made, without reference to the exhibits or court decisions, those allegations would not warrant the court in declaring the agreement of July 27, 1901, to be void or not binding on the parties. As we understand the principles of equity, it will never relieve parties from the consequences of their contracts unless they have been induced to enter into such contracts by fraud, deception, accident or mistake. Nothing resembling either of these things is alleged in this cross-bill; on the contrary, it is averred and insisted that both parties to the contract knew just what they were doing and the exact purpose to be accomplished; that that purpose affected only third persons, and as between the parties themselves it was to be simply as so

Here the case made is that the parties had taken their position, executed this contract, placed it upon record, used it before the courts, and in every way represented to the world that it was a valid, subsisting instrument. We submit that neither of them could subsequently, "simply because his interests have changed," aver that it had never been valid at all.

The principle underlying our law of estoppel is also broadly recognized in the system of law governing Porto Rico—in fact, it is one of the maxims of the Spanish law. It has been described by the Supreme Court of Porto Rico as "the moral and juridical principle that no one can deny his own acts" (nadie puede ir contra su propios actos).

> Fernandez *vs.* Gutierrez del Arroyo, 3 Castro, Dec. de P. R., 37, 42; 10 P. R. Rep., 59, 69.

Let it also be remembered that the case here attempted to be made is not the *subsequent modification* by parol of an existing valid contract, either as to the partnership articles or as to the postponement of its mortgage right by that partnership. The allegation of paragraph I of the cross-bill is clear and positive, referring to the assignment of Van Syckel's leasehold right to the partnership, that: "*Upon* the assignment and transfer of the said mortgage" (which was effected by the signing of the articles) "it was intended by him and understood between him and defendants * * * that the said firm * * * should acquire all of the rights and title of every kind and character, whether as mortgagee or lessee, which the said Van Syckel had," etc.

And with reference to the document of "Postponement of Right" the allegation is equally clear. It is stated that the idea of that document was conceived in the mind of their legal counsel, that "acting upon this advice and for such reason only" the parties "*entered into* the agreement of the twenty-seventh of July, 1901," and that "it was agreed and understood however *at the time* between" the parties "that

this agreement should in no way as between the said parties affect," etc.

In the case of each document, then, it is attempted to set up a contemporary verbal agreement vitally modifying—in the case of the document of July 27, 1901, even annulling—the solemn writing. We had supposed it to be elementary that such allegations could not be a basis for such action, unless it were averred that such contemporary matter would show fraud or mistake in securing complainant's signature to the written document.

It seems hardly necessary to cite authorities, but the law covering the point has been so clearly stated in one decision of this court involving identical circumstances, so far as affects the present contention, that we cannot refrain from quoting:

> "The position of plaintiff in error is in the first " place, that the evidence on his behalf tended to " show an agreement between himself and defendant " in error, entered into prior to, or contemporaneously " with, the written contract, independent of the latter " and collateral with it, that the machine purchased " should have a certain capacity and should be capa- " ble of doing certain work; that the machine failed " to come up to the requirements of such independ- " ent parol contract; that this evidence was com- " petent; and that the case should therefore have been " left to the jury."
>
> "Undoubtedly the existence of a separate oral " agreement as to any matter on which a written " contract is silent, and which is not inconsistent with " its terms, may be proven by parol, if under the cir- " cumstances of the particular case it may properly be " inferred that the parties did not intend the written " paper to be a complete and final statement of the " whole of the transaction between them. But such " an agreement must not only be collateral, but must " relate to a subject distinct from that to which the " written contract applies; that is, it must not be so " closely connected with the principal transaction as " to form part and parcel of it. And when the writ-

> "ing itself upon its face is couched in such terms as
> "import a complete legal obligation, without any un-
> "certainty as to the object or extent of the engage-
> "ment, it is conclusively presumed that the whole
> "engagement of the parties, and the extent and
> "manner of their undertaking, was reduced to writ-
> "ing.
>
> "There is no pretense here of any fraud, accident
> "or mistake. The written contract was in all re-
> "spects unambiguous and definite. * * *
>
> "We are clear that evidence tending to show the
> "alleged independent collateral contract was inad-
> "missible."
>
> Seitz *vs.* Brewers', etc., Co., 141 U. S., 510.

It has not escaped our attention that the case quoted from was a case at law, nor that the court was discussing the effect of evidence rather than of pleading; but we believe the rule to be the same in equity as at law, unless the basis of equitable jurisdiction is a claim of fraud, accident, or mistake vitiating the contract—which is wholly absent in the case at bar, as in that cited—and we believe that a pleading cannot be good where its allegations show that it can be supported only by evidence which is inadmissible.

Tha prayer of the cross-bill was to declare the contract of "Postponement of Right" void and decree its cancellation. In this view, the holding of this court in a case in which the bill was filed to cancel a deed of release of an interest in the capital stock of a defendant corporation is pertinent, and Mr. Justice Strong, delivering the opinion, said:

> "It is obvious, at first sight, that most of the alle-
> "gations of the bill have little, if any, relevancy to
> "that subject. At most, they are matters of induce-
> "ment, introductory to the one important averment
> "upon which alone the bill can rest. That averment
> "is, in substance, that untrue and incorrect state-
> "ments of the condition and affairs of the company
> "were exhibited to the complainant's assignee, with
> "intent to deceive him; statements by which he was
> "deceived and induced to consent to the settlement

"that was made, and to execute the release of the "stock. Unless this allegation has been sustained by "proof, the complainant's suit must fail.

"Canceling an executed contract is an exertion of "the most extraordinary power of a court of equity. "The power ought not to be exercised except in a "clear case, and never for an alleged fraud, unless "the fraud be made clearly to appear; never for al- "leged false representations, unless their falsity is "certainly proved, and unless the complainant has "been deceived and injured by them."

Atlantic Delaine Co. *vs.* James, 94 U. S., 207.

Where, therefore, as in the case at bar, the allegations upon which such a prayer is based make no showing of fraud, accident or mistake underlying the execution of the contract *imposed by one party upon the other*, but plainly aver that both parties entered into it with full knowledge and *for the sole purpose of deceiving others*, no case is made for the intervention of a court of equity to cancel the contract *as between the parties* or their privies.

(b) *Cross-bill Showed Complainants Therein Did Not Come into Court with Clean Hands.*

Thus far we have discussed the sufficiency of the cross-bill upon the assumption that its allegations involved no question of illegality or moral turpitude in the oral agreement alleged. But the third ground of the demurrer raised that question, and we now submit that, if its allegations of fact were true, the cross-bill showed a course of action so conceived in iniquity and executed in fraud and imposition upon others that a court of equity should scorn to lend its aid to the wrongdoer.

It is unnecessary to quote again those parts of the cross-bill which explain the alleged purpose of executing the agreement of July 27, 1901, called the document of "Postponement of Right," which it is the main purpose of the cross-bill to have canceled; reference need only be made to

pages 16-19, *ante*, where such quotations appear. The substance of these allegations, as we conceive it, was that this document was a pure fiction as between the parties, and had been conceived, drawn up and executed in order that Montilla, believing it to be real, might be influenced in the course he should elect to pursue in his threatened suit to have all the transfers by which Van Syckel or P. Van Syckel & Company had obtained possession and title to this plantation, "Santa Cruz," set aside, and that in case such suit was finally brought this superiority of the lease over the mortgages might be used in some unexplained way to the advantage of said parties. Whether the first part of the alleged plan was effective probably Montilla only can tell, but that the use proposed was actually made of the document, so that, in case it was merely a fiction, the courts of justice were deceived and induced to consider it genuine, is shown by the recitals of the court judgment which was made a part of the cross-bill as Exhibit No. 2 (page 42), as well as by the supplemental judgment in the same suit (page 45), whereby Van Syckel was left in possession of his 279 cuerdas of land under his lease after the foreclosure.

The court below had before it, and we think had a right to take judicial knowledge of, the decision and opinion of the Supreme Court of Porto Rico upon appeal by Montilla of the case which he had brought against these parties, which is referred to in paragraph VII of the cross-bill. From this decision it appeared that as late as 1905 appellees were still maintaining the continued existence and validity of the Van Syckel lease, although according to the contention of the cross-bill there had been upon the foreclosure and adjudication of the plantation to P. Van Syckel & Company in November, 1901, "a merger or confusion of rights, by reason of which the said lease no longer exists."

Montilla *vs.* Van Syckel, 2 Castro, Decisiones de P. R., 281, 295-8; 8 P. R. Rep., 153.

The question, then, is, in view of such allegations and other matters properly before the court, Was the court warranted in retaining the cross-bill as sufficient and requiring appellants to answer it? In other words, could those complainants in the cross-bill come into the court of equity and be allowed to say that what they had been theretofore maintaining and asking the courts of the country to uphold as valid *as against others* was a pure fiction and had never had any existence as between the parties to it, and to secure its cancellation? A court of equity will not aid them to that end, but will leave them where it finds them, if we understand the decisions.

The leading early case in which the necessity of coming into a court of equity for affirmative relief with clean hands is often called the Sims case, wherein one Creath had attempted to enjoin the enforcement of a judgment on the ground that the transaction back of the proceeding was an illegal one; but it appeared that Creath had been a party thereto, and, discussing that aspect of the case, Justice Daniel used language that has since been often quoted, saying that it expressed "principles of equity jurisdiction which may be affirmed to be without exception":

> "Whoever would seek admission into a court of "equity must come with clean hands, and such a "court will never interfere in opposition to con- "science or good faith. The effect of these prin- "ciples upon the statements of the complainant is ob- "vious upon the slightest consideration. The com- "plainant alleges that the obligation to which he had "voluntarily become a party was intentionally made "in fraud of the law, and for this reason he prays to "be relieved from its fulfillment. This prayer, too, "is addressed to a court of conscience; to a court "which touches nothing which is impure. The con- "dign and appropriate answer from such a tribunal "to such a prayer is this: that however unworthy "may have been the conduct of your opponent, you "are confessed *in pari delicto;* you cannot be per- "mitted here to plead your own demerits; precisely,

> "therefore, in the position in which you have placed
> "yourself, in that position we must leave you."
> Creath's Adm'r *vs.* Sims, 5 How., 192, 204.

In a subsequent case, very similar in its facts, the above quotation was repeated by the same justice, who further there said:

> "He certainly possessed, at some period of time,
> "knowledge of the character of that transaction; and
> "if his knowledge reached back to its origin and
> "purposes, or to the date of his own participation
> "therein, he must be viewed as standing *in pari*
> "*delicto* with all similar actors therein—a position
> "which, however, it might shield him against at-
> "tempts from associates in wrong, so far as these
> "could be urged through the instrumentality of
> "courts of justice, can invest him *with no rights,*
> "*either at law or in equity, as against advantages ac-*
> "*quired by his confederates.*" (Italics ours.)
> Sample *vs.* Barnes, 14 How., 70, 73.

In another case in this court a bill in equity had been filed to enforce an oral agreement to the effect that one who had obtained a decree under a foreclosure of mortgage should, if an immediate sale under the decree was permitted to take place, bid in the land at a nominal price and hold it in trust for the defendant in that suit, one of the complainants in the new bill, until she could pay the amount of the decree in installments. As a reason for making this oral agreement it was alleged that the delay in the sale would permit other parties fraudulently to obtain possession of a part of the land. It was then charged that the complainant in the foreclosure, having bid in the property under the alleged agreement, was ignoring that agreement and claiming to hold the property as his own; hence the prayer was that the court compel compliance with the oral agreement, or a new sale of the land for the payment of the mortgage debt. This seems to us a situation much less objectionable than that alleged by the cross-bill in the case at bar, yet this court said:

"These allegations, stripped of their indefiniteness " and vagueness, mean simply this: that the parties " to this bill, in order to counteract a claim set up " by other parties to a portion of the mortgaged " lands, combined together, through the aid of the " court, to shorten the time of sale, and *to cover up* " *the real ownership of the property.*

" *A fraudulent agreement* was entered into to de- " feat, as is charged, 'a fraud attempted against the " complainants.' If the claim set up was a fraud on " the rights of the complainants, does that considera- " tion change the character of the agreement which " was made to defeat that fraud? Manifestly not. " The whole complaint of the bill is that the defend- " ant will not execute the agreement thus fraudulent- " ly made, and the object of the bill is to compel him " to do it.

"A court of equity will not intervene to give relief " to either party from the consequences of such an " agreement. The maxim *'in pari delicto potior est* " *conditio defendentis'* must prevail. It is against " the policy of the law to enable either party, in con- " troversies between themselves, to enforce *an agree-* " *ment in fraud of the law, or which was made to in-* " *jure another.*" (Italics ours.)

Randall *vs.* Howard, 2 Black, 585.

If the agreement in that case was *fraudulent*, the agreement alleged by the cross-bill to have existed between Van Syckel and the firm of P. Van Syckel & Company was also fraudulent. The same purpose to deceive the court, to cover up the real ownership of property, and "to injure another," to wit, Montilla, caused its conception. Whether or not it was well conceived to accomplish these purposes, or whether the claims of Montilla, which were to be thus outwitted, were valid or invalid, cannot, according to the law above laid down, "change the character of the agreement." It is to be judged by the *motive behind it*, not by the result.

Another case analogous in principle is that spoken of in the decision itself as "The Warehouse Case," in which this court found that the parties had combined to acquire the

property of an insolvent debtor in such manner as to shut out the other creditors. One of the conspirators afterwards deserted the combination and went in to accomplish on his own account, and did accomplish, the object the combination had in view. Another of the conspirators then sued for the share he would have been entitled to had the combination remained intact. This court comments as follows:

> "The court was imposed upon, and a combination
> " formed, the object and direct tendency of which
> " was to secure the title to the valuable real estate of
> " an insolvent debtor, at the expense and sacrifice of
> " his creditors. A proceeding like this is against
> " good conscience and good morals, and cannot re-
> " ceive the sanction of a court of equity. The prin-
> " ciple is too plain to need a citation of authorities
> "to confirm it. It is against the policy of the law to
> " help either party in such controversies."
>
> Wheeler *vs.* Sage, 1 Wall., 518.
>
> See also, Scholey *vs.* Rew, 23 Wall., 331.

There is also a line of cases, too numerous to need citation, where failing debtors have, for the purpose of keeping their property out of the grasp of their creditors, conveyed it to some one to hold on a secret trust—and then that some one, like the defendant in the Randall case, *supra*, has yielded to the temptation to keep it as his own, and the debtor has sued to enforce the secret trust. This and other courts have, of course, uniformly held that equity will not interfere to adjust rights under such conveyances as between the parties thereto. *Creditors* may maintain suits to set them aside and subject the property conveyed to *their* debts, but if the grantee denies the claim of the grantor the courts will not assist the latter, but leave him to the consequences of his fraudulent device.

Wolf *vs.* Styx, 99 U. S., 7.

Ballard *vs.* Searles, 130 U. S., 55.

Dent *vs.* Ferguson, 132 U. S., 50, 66.

So, here, if the agreement of "postponement of right" was a fictitious and fraudulent device for the purpose of concealing the title of "Santa Cruz" and keeping it out of the hands of Montilla, equity will relieve neither party from its consequences, but, in settling any controversy *between them*, will regard the document as meaning what it purports upon its face to mean.

At this point it may be well to make clear the difference in the situation of the complainants in the original bill (appellants) and the complainants in this cross-bill (appellees), so far as the alleged fictitious or simulated character of the instrument of July 27, 1901, is concerned. In the first place, appellants have not alleged the existence of any fraudulent agreement, and are not asking the cancellation of any instrument. On the contrary, they strenuously contend that every act of Paul Van Syckel and of P. Van Syckel & Company, so far as his knowledge went, was straightforward and honest, and every instrument executed by them was genuine. They prayed for a distribution of the partnership assets, giving every agreement and instrument the force and meaning it bore upon its face. And *under the issue made by appellees' answer to the original bill no question was made of the meaning or validity of any instrument or agreement.* It was only by the filing of the cross-bill by the appellees that these astonishing allegations became a part of the controversy, and solely upon the strength of them appellees were asking affirmative relief in the way of the cancellation of this instrument.

Indeed, that was the reason why they were compelled to ask for the affirmative relief.

Hence, if the court had sustained our demurrer, as we believe we have shown it should have done, the cross-bill would have been eliminated and a decree would have been granted upon the original bill, answer, and proofs—without relief of any kind being asked inconsistent with the terms of written agreements or instruments. In fact, in that event the decree would have been similar to that al-

ready entered, except that the division of assets would have been subject to a continued right of lease in complainants of the 279 cuerdas of land, so long as they paid to the other party the half of the stipulated rent. We wish, thus, to make plain that the allegations of the cross-bill did not affect the right of appellants to obtain the relief asked by them; nor, indeed, have appellees taken any appeal from the other provisions of the decree below.

POINT TWO.

Lease of June 23, 1897, Still Valid and Subsisting.

This point covers the second and third assignments of error. The court below made nineteen findings of fact, and from said findings deduced six conclusions of law (pages 69-84), of which the two conclusions involved in said second and third assignments of error read as follows (page 84):

> "1. That the contract of lease executed on the "23rd day of June, 1897, between Emilio Montilla "and Paul Van Syckel is without legal force or "effect and has ceased to exist.
>
> "2. That the leasehold rights previously existing "in said Paul Van Syckel were merged in the fee "title to said farm 'Santa Cruz,' acquired by the "firm of P. Van Syckel and Company by virtue of "the adjudication to it in the foreclosure suit against "Montilla, and as a result of their agreement, set "forth in the findings of fact, executed between Paul "Van Syckel and P. Van Syckel & Company."

The question here to be discussed is whether these conclusions were warranted by the findings of fact. The prior existence of the contract of lease is found in the finding numbered II (page 69), where a translation of the same is given. The original articles of partnership of P. Van Syckel & Company are contained verbatim in the finding numbered

VII (pages 71-5). From this finding the court can see that a detailed description of the assets contributed to said firm by Paul Van Syckel is given, and that in such description no mention or reference is made to the leasehold rights of Van Syckel under his contract of lease aforesaid. By the VIIIth finding of fact the terms of what is called the document of "postponement of right" are shown, and from the last clause (page 77) the covenant and agreement to subordinate the right of the firm under their mortgages to the recognized existing right of Van Syckel clearly appears. The Xth finding of fact (same page) contains a *verbatim* translation of the contract of extension of the partnership of P. Van Syckel and Company, from a perusal of which it will be seen that no reference is made to any change in the rights of the parties touching said plantation "Santa Cruz" except that the mortgage credits held under the original articles of partnership had been converted by the foreclosure suit into a title of ownership by adjudication. The last clause of said articles, however, may by inference be argued to contain a recognition of the continued force of the lease in accordance with the document of "postponement of right," because it says that the partnership shall continue its business and operations—

> " under the same clauses and conditions as are stipu-
> " lated in the instrument of organization therein re-
> " ferred to in paragraph I of the facts herein with-
> " out making in any one of them any alteration that
> " may modify the context thereof, and without any
> " other explanation than that stated in paragraphs
> " fifth, sixth, and seventh of this instrument."

By the XIth finding (page 79) the court finds that in November, 1902, the plantation "Santa Cruz" was leased to one Rosales for four years, and that for said lease two documents were made out, one of them being a sublease of the 279 cuerdas, executed by Paul Van Syckel as lessor; the other for the remaining 35 cuerdas, being executed by P. Van

Syckel & Company. In the same finding of fact appear the articles of partnership of the Santa Cruz Sugar Company, by the seventh article of which it was provided that the lessees should

> "pay $175.00 monthly as rent to the person or cor-
> "poration which at any time shall appear to be the
> "owner or lessee thereof."

By the XIIIth (page 82) finding it is stated that in the suit brought by Montilla against Van Syckel, P. Van Syckel & Company, and Marxuach, for the purpose of canceling and annulling all of the transfers which had deprived Montilla of his property, and also to have declared void said lease of June 23, 1897,—

> "said Van Syckel and P. Van Syckel & Company
> "as parties to that suit defended the existence and
> "validity of that lease in accordance with the agree-
> "ment between them, as hereinafter set forth, both
> "being represented by the same counsel, and ob-
> "tained from the trial court a judment sustaining
> "their contentions in all respects; that on September
> "24, 1903, Montilla took his appeal from that judg-
> "ment to the Supreme Court of Porto Rico, where
> "the same contentions were again made by counsel
> "for the respective parties; and that on March 11,
> "1905, said Supreme Court rendered its decision
> "affirming the judgment of the lower court in all
> "respects and expressly holding after full discussion
> "that said lease was a valid, recordable and sub-
> "sisting contract."

So far it is clear that all of the facts found are entirely inconsistent with and in no way support the conclusions of law above quoted; but the court below proceeded to include as findings of fact certain statements which we believe are not properly findings of fact, but merely expressions of an opinion on the part of the court as a result of his view of the law applicable to the facts he had found (Houston & T. C. R.

Co. vs. Texas, 177 U. S., 66, 80), and from the oral testimony given by the lawyer Eduardo Acuña, which is shown in that part of the certificate of the judge below containing the rulings of the court upon the admission of his evidence (pages 85-88). For instance, the XIVth finding of fact reads as follows (page 83):

> "The said Paul Van Syckel during his lifetime "agreed with Sobrinos de Ezquiaga by the terms of "his partnership in the firm of P. Van Syckel & "Company and otherwise that said firm of P. Van "Syckel & Company should be the sole and exclusive "owners of the said farm 'Santa Cruz,' free and clear "of any claims upon the part of said Paul Van "Syckel by reason of said lease of June 23, 1897; and "that said deed of postponement should be kept alive "and represented as binding between the parties for "a common purpose as between said Paul Van Syckel "and said Sobrinos de Ezquiaga, to wit, for the "protection of the title of said P. Van Syckel and "Company to said farm 'Santa Cruz'; but it was at "the same time understood and agreed between the "parties that it was not to be given force or effect "as between them nor as against the absolute title of "said P. Van Syckel and Company to said farm, in-"dependent and free from the lease aforesaid, should "the Montilla mortgage be thereafter foreclosed and "said P. Van Syckel & Company become purchasers "of the property."

The court first says that an agreement that P. Van Syckel & Company should be sole and exclusive owners of the farm "Santa Cruz,"

> "free and clear of any claims upon the part of the "said Van Syckel by reason of said lease,"

is proven

> "by the terms of his partnership in the firm of P. "Van Syckel & Company, and otherwise."

We have already seen from the previous findings of fact that no such thing appeared by the terms of the partnership, or by any other documentary evidence; hence it must have appeared, if at all, by oral testimony.

The court further says that it was agreed that the deed of postponement should be kept alive and represented as binding between the parties for the protection of the title of the partnership to the property, but that it was not to be given force or effect as between themselves. In other words, the court found exactly what the cross-bill had alleged. This was the equivalent of the court finding that the terms and conditions of the notarial documents (which are literally incorporated in the other findings of fact) could be contradicted by certain oral evidence which had been admitted in the cause. This conclusion is repeated in more general terms in the XVIIth finding of fact (page 84), wherein it is stated that the evidence was "clear, unequivocable and convincing" that the lease was to have no life or effect as between the parties after the date of the partnership, and that the same was merged in the fee at the time of the adjudication thereof to said partnership, if not before.

As we have already shown that the documentary evidence incorporated in the earlier findings is wholly inconsistent with these findings, the conclusion is unavoidable that the court considered and gave greater force to the oral testimony produced to support the allegations of the cross-bill than to the documents themselves. This conclusion is further made certain by the consideration that the cross-bill itself alleged the existence of no documents inconsistent with those above referred to, which were largely documents produced by appellees themselves, but rested upon the "under-standings" between the parties.

The question, therefore, of what legal conclusion should properly be deduced from these various findings of fact taken together involves practically the same considerations already argued under point one, *ante*, that is to say, if the cross-bill

alleged an "understanding" unenforceable in equity, these findings prove simply the same understanding and did not warrant the granting of relief.

We wish, however, to call the attention of the court to one other consideration derived from the findings of fact which we think renders it impossible to support the conclusions of law referred to, and that is that the *thirteenth finding of fact* shows that as late as March 11, 1905, the Supreme Court of Porto Rico rendered a decision in favor of the contentions theretofore and up to that time made and sustained by P. Van Syckel & Company to the effect that the lease in question was at that time a valid and subsisting contract; that from that judgment Montilla started to take a further appeal to this court, but that in order to avoid any further question of the findings in said judgment of March 11, 1905, and that the matters determined by that judgment might remain as the undisputed facts and law of the controversy, P. Van Syckel & Company made or approved a compromise with Montilla involving the dismissal of his appeal to this court, that contract of compromise being signed as late as December 30, 1905, while from the twelfth finding of fact it appears that Paul Van Syckel had already died in Havana on the 27th day of December, 1905.

By this solemn acceptance of a court judgment, if not otherwise, we think appellees should be held bound.

But whether or not the court may determine that finding XIV contains matters inconsistent with the previous findings referred to, or that it is a finding of opinion rather than of fact, we submit that the same argument must prevail against it that we adduced against the cross-bill itself. The court finds as parts of one and the same agreement two things: First, that the firm should own Santa Cruz free and clear of any claims of Van Syckel; and, second, that the deed of portponement should be made and kept alive for a common purpose, to wit: the protection of the title of the firm to the plantation, while the same was to have in reality

no force or effect as between them nor as against the absolute title of the firm. Conceding, as they did, the prior validity of the lease, P. Van Syckel & Company could therefore only "own Santa Cruz free and clear of" it by virtue of the finding of the fictitious character of the agreement of postponement.

The purpose as found is therefore practically identical with the purpose as alleged in the cross-bill, and, as has been argued in the discussion of the legal effect of those allegations, we insist that that purpose was essentially fraudulent and boldly illegal, and that consequently such a finding could not serve as a valid basis for the legal conclusion which the court reached, but that the proper legal conclusion from such a finding must be that such an agreement was in law fraudulent, void and of no effect, and that *the contract which was the subject of it remained unaffected and in full force*.

Finally, even if we concede for the sake of argument that this agreement of postponement was in fact made for the purpose found by the court, and that that purpose, as also found by the court, was not fraudulent, still the conclusion of law reached was not correct in the absence of a further affirmative finding that said agreement was not only reduced to writing, but put in the form of a public instrument.

It was conceded, we say again, that the lease was valid at the time of its execution and would have been still subsisting but for this agreement. It must also be conceded that this lease was "a property right in real property," as it was both recordable and recorded. Therefore we submit that any contract modifying or extinguishing it could not be valid unless evidenced by a public instrument. The Civil Code of Porto Rico of 1902 provides, under the head of Contracts:

> "SECTION 1247. The following must appear in a "public instrument:
> "1. Acts and contracts, the object of which is the

"creation, modification or extinction of property
"rights in real property."

* * * * * * *

From all the foregoing considerations we think it clear that the conclusions of law referred to were not warranted by the findings of fact, and that said findings could properly lead to no other legal conclusion than that cross-complainants were estopped to deny the continued existence and binding force of the lease which the court below ordered canceled.

POINT THREE.

The Deed of Postponement of July 27, 1901, Should Not Have Been Canceled.

This point covers assignments of error numbered four, five, and six. In the discussion of this point the same findings of fact to which attention was called under the preceding point are material up to the quotation from the thirteenth finding. The finding specifically referring to the deed of postponement is that numbered XV, wherein the court says:

> "The court finds that the deed or document of
> "July 27, 1901, executed between Paul Van Syckel
> "and the defendants P. Van Syckel and Company
> "was executed between the parties in accordance with
> "the understanding and common purpose above set
> "forth, in order that P. Van Syckel & Company
> "might protect itself against the claims of Montilla
> "in the event that he should be permitted by the
> "courts to set aside the mortgage foreclosure ex-
> "ecuted by him to Marxuach and subsequently trans-
> "ferred by the latter to P. Van Syckel & Company;
> "that it was the purpose of Paul Van Syckel and the
> "defendants Sobrinos de Ezquiaga to assert the lease
> "previously executed by Montilla to Paul Van Syckel
> "only in the event that Montilla should be entitled
> "to redeem the property."

It is sufficient to say in the argument under this point that this finding of fact shows that the understanding and common purpose referred to was a fraudulent one and one which a court of equity should not permit a party before it to take advantage of for the purpose of avoiding his obligation under, and obtaining the cancellation of, a written instrument. As said under the previous point, the legal considerations and authorities supporting our present contention were presented to the court above under subsection (*b*) of point one (pages 33-40). If we are right in this contention, it follows that the court was not warranted from said finding of fact in holding said deed of postponement was without legal force as between the parties, nor that the appellees were entitled to the relief prayed in their cross-bill for the cancellation of the said lease; but notwithstanding the court's belief that the existence of such an understanding and common purpose was proven, the court should have held that it was said understanding and common purpose that was fraudulent and of no effect rather than that such common purpose rendered void and of no effect a solemn, notarial agreement.

The court seems to have been conscious of difficulty in maintaining its conclusions, so it inserted the sixteenth finding to the effect that although such an agreement might be near the line of fraud, as the judge had admitted in his opinion (page 61, bottom), yet the evidence did not show "that any direct intentional deceit was actually practiced upon the courts, or, in the last analysis, that any fraud was thereby practiced upon said Montilla." But, as the cases hereinbefore cited show, the question does not turn upon the success of the conspirators in accomplishing their fraudulent purpose, but upon the *motive and intent* of their actions.

If a man's evil intentions fail of accomplishment in spite of his best efforts, none the less is he guilty of moral turpitude in harboring and attempting to execute them, and none the less will the courts refuse to consider him as coming to them with clean hands.

POINT FOUR.

Estoppel Against Appellants Not Warranted.

This point covers the seventh assignment of error. We are unable to conceive upon what the court based its idea of estoppel as applied to the complainants by virtue of anything contained in the findings of fact. The cross-bill attempted to establish a basis of estoppel by allegations of a course of conduct on the part of Van Syckel after the formation of P. Van Syckel & Company, it being alleged that he had never paid any rental to P. Van Syckel & Company under his lease, and that he had allowed P. Van Syckel & Company to lease the property included in Van Syckel's lease, and that accounts had been rendered by P. Van Syckel and Company to Van Syckel showing its absolute ownership of said plantation without any objection on his part—in short, that Van Syckel

> " recognized and respected the absolute rights of P.
> " Van Syckel & Company as the sole and exclusive
> " owner of the said hacienda without any claim on his
> " part, either as lessee or otherwise," (page 31)

but the findings of fact are wholly silent in this regard except that the XIth finding contradicts the allegation of the cross-bill so far as the question of making contracts of lease is concerned, and in the latter clause of the XIIth finding it is stated that although it was proven that the Santa Cruz Sugar Company charged themselves with the rental of one hundred and seventy-five dollars ($175.00) per month, it did not satisfactorily appear to whom the same was paid.

If it was the idea of the court that an estoppel could be based upon the findings numbered XIV and XV, then the arguments we have made under the two previous points as to the effect of those two findings are applicable to that contention and show that it should not prevail.

POINT FIVE.

Testimony Objected to Not Admissible.

This covers the eighth assignment of error. Objection to only two answers of a single witness is insisted upon, but the admission of those two answers was vital to the interests of appellants.

The court will bear in mind that the answer of appellees to the original bill simply admitted or denied certain of its allegations and contained no reference to any oral agreement at variance with the writings made a part of the bill; while the cross-bill, which was filed at the same time, set up these oral agreements and understandings which were alleged to have modified or vitiated those written contracts, and that in this cross-bill were also contained the allegations that these understandings (which included one that a notarial document then about to be executed should be effective only so far as it might affect the rights of others, but as between the parties should be as waste paper) were the result of advice given to both partners by a lawyer named Acuña. It is also to be borne in mind that one of the partners, Paul Van Syckel, died in 1905, and that this testimony of Acuña was given in 1908, while he was still the lawyer of appellees. This much is explained in the first part of the certificate of the judge (page 85). As soon as it developed that an attorney was about to disclose conversations with his client, not only without that client's consent, but after he was dead, the court took notice of the situation and a colloquy between the judge and counsel ensued which, with the other material proceedings leading up to the questions and answers which are the subject of the present assignment, is shown by the certificate as follows:

> "The COURT: Is this testimony to be in his interest—in Mr. Van Syckle's interest?

"Mr. DEXTER: Against his interest.

"The COURT: An attorney, without his client's consent?

"Mr. DEXTER: I have prepared for that.

"The COURT: When you ask the question we will hear from you further. I know there is a well-known line drawn where it is not only proper for an attorney to testify, but he can be required to testify where it is of a certain character, but I didn't understand there could be any question of that kind here, because it is against his interest.

"Mr. DEXTER: But at that time it was for his interest.

"Mr. PETTINGILL: The question of interest, if your honor please, is a matter to be determined when the disclosure comes up."

Whereupon an argument ensued upon the question, and the court adjourned in order to have opportunity further to consider it. Upon resuming the hearing:

"The COURT: At the last hearing of this legal question now before this court, counsel for the complainants objected to Mr. Acuña being permitted to testify, on the ground that the testimony he was about to give was privileged between attorney and client, as he, Attorney Acuña, was the attorney for both the predecessor in interest of complainants and of these respondents at the time of the transactions he is about to testify to.

"Mr. PETTINGILL: And further objects on the ground that the making of the notarial instrument of July 27, 1901, postponing the mortgage right of Sobrinos de Ezquiaga to the leasehold rights of Paul Van Syckel is alleged by said Sobrinos de Ezquiaga to have been a simulated transaction, which, if true, was confessedly to deceive the courts of justice and to claim rights as against their opponent, Montilla, under that instrument as an existing contract which they are now asking this court to find did not then exist, but had been merged in the title of P. Van Syckle & Company.

"The COURT: And now, at 2 p. m., on Saturday, the 18th day of April, 1908, the court having had said objections under advisement since the last adjournment, announces that the objection to the testimony of Mr. Acuña is overruled, but reserves the right during the admission of such testimony to scrutinize its nature and to modify this ruling if necessary; and as to the second objection, which virtually means that respondents in their cross-bill are not coming into court with clean hands, the court holds its ruling hereon in abeyance, as it cannot decide it at this time under the facts in connection therewith. It is well settled that when an attorney is employed by two persons to perform professional services jointly for them and the clients afterwards get into a dispute about it between themselves, communications made to the attorney at the time of the employment by either of them in the presence of the other are not privileged, and either of the parties in the subsequent litigation between themselves can even compel the attorney to testify without the consent of the other joint employer.

"Mr. PETTINGILL: To which ruling complainants, by their counsel, except."

"The court subsequently in its opinion overruled the second objection above made by complainants. Mr. Acuña was thereupon recalled to the witness stand, and further testified as follows, it being understood by counsel and the court that counsel for complainants be considered as objecting to, and excepting to, the ruling of the court adversely to him upon each of the questions to which the objections last above stated and ruled upon generally were applicable."

Acuña then proceeded to testify in substance that he represented P. Van Syckel & Company in the suits brought by them against Montilla; that in that whole matter he represented all parties interested, including Paul Van Syckel personally; that the object of his employment was to represent them in the mortgage foreclosure and in the series of suits begun by Montilla in consequence of that foreclosure; that

the foreclosure was begun in 1901 and ended in November of that year; and that Montilla's suit to annul the foreclosure sale was begun in the early months of 1902. Then the document of postponement of right was shown him, and he stated that he was the attorney of the parties to it at that time; and he advised the making of the document before the beginning of the foreclosure suit; that he discussed the matter of postponing the mortgage with Van Syckel, who made the deed of postponement in accordance with the advice of witness; that such postponement was the purport of the advice and of the instrument, and that what Van Syckel did was, in combination with Messrs. Ezquiaga, to carry out the lease and postpone the mortgage to it—"that is, alternating the relative situation of the two liens."

Then, in answer to a question of counsel for appellees, the witness stated that he remembered what caused the postponement of the mortgage; whereupon he was asked the questions quoted in the assignment of errors, the full language of the certificate in that respect being as follows:

> "Q. Now, Mr. Acuña, after you had given certain advice about the method of defending by both Paul Van Syckel personally and P. Van Syckel & Company against Montilla, what did Mr. Van Syckel do or say with respect thereto?
>
> "A. He followed absolutely my advice and the lease of the Santa Cruz estate remained standing purely as a means of defense against the suit of Montilla.
>
> "Mr. PETTINGILL: I move to strike that answer out as giving simply the opinion of the witness.
>
> "The COURT: No, I will overrule that.
>
> "Mr. PETTINGILL: Note an exception.
>
> "Q. Did Mr. Van Syckel say anything to you with respect to the cancellation of the lease?
>
> "A. Yes, sir; on several occasions he spoke to me about the subject of canceling the lease, and I advised to the contrary, because that lease was the means of defense against any suits that Montilla might bring

> during his lifetime, that that lease was entirely fictitious.
>
> "Mr. PETTINGILL: Now, I move to strike all that out as the opinion of the witness.
>
> "The COURT: It won't be all stricken out.
>
> "Mr. PETTINGILL: I mean from the time he begins to say that this was a good defense and was all fictitious.
>
> "The COURT: I am going to leave that there as far as it goes, but I won't let it go any further.
>
> "Mr. PETTINGILL: I ask an exception."

It therefore results from the certificate made by the court below that the admissibility of the testimony is to be considered upon three grounds: (1) Whether it should have been excluded as a confidential communication between counsel and client; (2) Whether the previous testimony of the witness had not disclosed that the whole arrangement was a simulation and fraud of which the parties in whose behalf the witness was testifying could not avail themselves in support of their cross-bill; and (3) Whether the answers in the form stated did not express mere opinion or conclusions of the witness rather than facts which the court could receive and act upon.

(1) *This testimony involved confidential communications between counsel and client.*

In ruling upon this objection the judge below said, as already quoted in the above excerpt:

> "It is well settled that when an attorney is employed by two persons to perform professional services jointly for them and the clients afterwards get into a dispute between themselves about it, communications made to the attorney at the time of the employment by either of them in the presence of the other are not privileged and either of the parties in subsequent litigation between themselves can even compel the attorney to testify without the consent of the other joint employer."

We have no disposition to dissent from the general principle of evidence thus laid down. But two questions arise: First, was the communication here sought brought within that principle? and second, is the rule of evidence in that regard in Porto Rico identical with the general principle?

As to the first question, it is to be noted that the witness nowhere intimated, nor was he asked, whether the conversations between him and Van Syckel had occurred in the presence of any representative of Sobrinos de Ezquiaga; on the contrary, the questions were distinctly confined to what Van Syckel alone said or did. It is also to be noted that neither of the answers contained in the assignment of error give the words or substance of any statement of Van Syckel to the witness. In the first answer he stated that Van Syckel followed his advice; that described a course of action, not a communication. In the second answer it is stated that Van Syckel spoke to him about canceling the lease, but no information is given as to what the former did or said about it. So that, we submit, the admitted fact that the witness at that time represented both parties has no bearing upon the admissibility of these statements.

As to the second question, the admissibility of these statements must, we think, be determined by the law of evidence of Porto Rico rather than by any generally accepted principle, and that law, Acts of General Assembly of Porto Rico, 1905, page 97, contained the following specific provision:

> "SECTION 40. A person cannot be examined as a witness in the following cases:
>
> * * * * * * *
>
> "2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity; but this paragraph shall

> not be applied to an action between the lawyer and his client, where the existence, amount, validity and circumstances of an agreement about the payment of fees are at issue; but no communication is privileged under this subdivision when the same is made with the intention that it should be communicated to any person having an interest adverse to the client, or when the same was made in furtherance of a crime or fraud then being perpetrated or in contemplation."

The system of the civil law has been continued in Porto Rico (Fernandez y Perez *vs.* Perez y Fernandez, 202 U. S., 80, 97; Romeu *vs.* Todd, 206 U. S., 358, 368.) Under this system the provisions of law are intended to be expressed in specific written codes instead of general principles. Hence, it should be considered that this section of the statute quoted above was intended to cover this subject and leave no room for intendment. That conclusion is supported by the particularity of its language and by its expressing the analogous exception of communications in suits between lawyer and client; yet no exception is made of such communications in suits between the parties involving a subject-matter as to which they had jointly employed the witness as their lawyer.

(2) *Testimony disclosed illegal purpose in the alleged agreement.*

We have no intention of repeating the argument already made in considering the character of the cross-bill. We only wish to enforce the proposition that this testimony was exactly in line with its allegations, and that, if a combination and conspiracy of the kind outlined in the cross-bill and attempted to be proven by the testimony of this witness is illegal and unworthy of support and enforcement by a court of equity, then the decree of the court below ought to be reversed and the cancellation of the agreement of July 27, 1901, be vacated.

It may possibly be argued that the clause of the above-quoted section from the law of evidence allowed confidential communications to be disclosed when made "in furtherance of a * * * fraud." But that is only applicable when the purpose of the disclosure is to aid in setting aside the fraud and relieving its victim, not when the purpose is, as here, to assist a participant in the fraud in avoiding an alleged fictitious instrument and contract executed as a part of the fraudulent scheme.

(3) *Answers stated opinions, not facts.*

The motions to strike the first answer and all but the first sentence of the second should have been granted upon this ground. Whatever may have been the intention of counsel for appellees in asking the questions, these answers set forth no facts responsive thereto, but gave the opinion of the witness upon matters which might prove harmful to the appellants—and how harmful it did prove may be seen from the opinion of the court where the testimony of this witness is discussed.

We direct attention to the fact that, up to the moment of the asking of the questions covered by this assignment of error, no statement of the witness had cast the slightest doubt upon the meaning or genuineness of this document about which he had been questioned—the agreement to postpone the mortgage right. He had stated that the postponement of the mortgage to the lease "was the purport or subject of my advice and of the deed," and that the result had been "alternating the relative situation of the two liens," and that "the only thing done by him (Van Syckel) was to carry out the deed of postponement for the parties." Then he was asked the first question quoted in the assignment, which was in effect, "What did Van Syckel do or say about the advice you had given him as to the method of defending the suits?" and the reply consisted of two parts. The first part was re-

sponsive, "He followed my advice"; while the second part was not responsive, but entirely voluntary and foreign to the question. Counsel had asked, not for the witness' statement, but for Van Syckel's. Moreover, both parts of the answer must be seen to be the expression of opinion simply as to the effect of Van Syckel's conduct. Not a single fact is stated.

The motion should also have been granted as to the portion of the second answer indicated. It may have been the opinion of the witness that the lease was means of defense and that it was fictitious; but he stated no facts or circumstances upon which the court could determine for itself whether or not that opinion was well or ill founded.

Had these motions been granted, all that would have remained was the first sentence of the second answer, that "he spoke to me about the subject of canceling the lease and I advised to the contrary," and the assertion made above as to Acuña's testimony up to this point, that no statement of his had cast a doubt upon the meaning or genuineness of the document of postponement, would have been true of his testimony taken as a whole. Then the court below could not have made these statements the main basis for the granting of relief on their cross-bill, as is shown by many intimations of its opinion that it did, and especially where it is said (page 62, bottom):

> "The language used in a later lease to the Santa Cruz Sugar Company plantation, that the rent shall be paid 'to the person or corporation which at any time shall appear to be the owner or lessee thereof,' but further confirms us in the belief that as between the parties themselves Sobrinos de Ezquiaga and Paul Van Syckel understood the object of the making of this postponing instrument to be exactly as the witness de Acuña testified it was."

This quotation indicates, what the rest of the opinion confirms, that the court below largely founded its conclusions as to the vital allegations of the cross-bill upon the testimony of

this witness, which we believe to have been inadmissible, not only for the specific reasons here suggested but also for the general reason that it contradicted and rendered inoperative the provisions and obligations of a solemn notarial contract without the proper foundation of deception, accident or mistake in the execution of the same having been proven.

Certainly it is often true that error in the admission of some evidence, even though it be material, will not be sufficient ground for reversal; but here, we submit, this testimony of Acuña was vital and is shown by the tenor of the opinion to have been accepted as sufficient to overcome the legal import of public documents; therefore, if improperly admitted and considered, the error involved in such ruling should be regarded as sufficiently important to require reversal of the decree below.

Resume.

We insist, therefore, that we have, in brief, sustained the following contentions:

1. The demurrer to the cross-bill should have been sustained and that pleading have been dismissed because

(*a*) it had no equity on its face;

(*b*) it disclosed as its only ground of relief a scheme fraudulent in law which equity could not countenance.

2. The findings do not warrant the cancellation of the lease of June 23, 1897, because

(*a*) the written instruments subsequently exectued, which refer to all, recognize its continued existence, while nothing tends to show the contrary except oral testimony;

(*b*) the findings which state facts confirm it, while those which impugn it state only opinions or conclusions of law;

(*c*) the appellees are estopped to deny its continued existence both by their course of action up to the death of Van Syckel and by seeking and taking the benefit of the judg-

ment of the courts of Porto Rico which recognized and enforced it; and

(*d*) no oral agreement, however valid and legal in other respects, can be effectual to extinguish a real property right in Porto Rico.

3. The instrument of "Postponement of Rights" has not been affected or modified to the prejudice of appellants, because

(*a*) the finding of the court below that an "understanding" existed to that end showed that such understanding was identical with that alleged in the cross-bill; hence one which the court of equity will not lend its aid in enforcing; and

(*b*) for the reason stated in 2 (*d*) supra.

4. The estoppel attempted to be set up against appellants because of implied recognition of the "sole and exclusive ownership" of the property by the partnership was not supported by any evidence.

5. The objections to the testimony of the witness Acuña should have been sustained.

POINT SIX.

Reply to Some Contentions of Appellees.

As this brief is practically the same as that presented upon the former appeal, and as we presume the contentions in opposition will be substantially the same, we may avoid the necessity of filing a brief in reply by now discussing the main contentions presented in their behalf.

Preliminarily we wish to comment for a moment upon the suggestion made at the beginning of the argument for appellees as to the practical situation of the parties in case

our contentions were sustained. That suggestion ignores the fact that neither the lease nor the real estate itself entered into the original partnership agreement. The $30,000 of assets consisted of $13,000 worth of personal property, the *mortgage* upon Santa Cruz of approximately $12,000, the value of a smaller farm a little over $4,000, and $1,100 of cash capital (*p.* 14). The mortgage was, of course, a lien upon Santa Cruz, and if Van Syckel had taken the course suggested, there would have been an even division of all personal assets and of the smaller farm and Van Syckel would have been required to pay one-half of the $12,000 mortgage, or it would have remained a lien jointly owned by the partners. So the situation of the appellees would not have been as terrible as suggested.

(4) The first contention of counsel for appellees is based upon the proposition that the "instrument of postponement was not intended to be operative between the parties except upon a contingency which never arose," and to support that proposition he cites three decisions of this court. Before discussing these decisions it must be insisted that the proposition is not identical with the case before the court. On the contrary, the allegation of appellees was that the instrument was a pure fiction, to be used for their protection against Montilla, to be sure, but *never* to be operative *between themselves*. Even should it come into use against Montilla, it was still to be a mere pretense as between themselves. Therefore the case presented is not one involving a *real contract* which is to go into effect in the future at a certain time or upon a certain condition, but involves a paper drawn up solely for its anticipated effect upon outside parties and never to be endowed with life.

This distinction is well illustrated by two of the cases cited in the opposing brief, Burke *vs.* Dulaney and Hartford Fire Ins. Co. *vs.* Wilson, wherein the contracts involved were *bona fide* and the only question was whether the con-

dition subsequent which was to give rise to their obligation had occurred.

Moreover, in reality both those cases were, like Michaels *vs.* Olmstead, the third case cited, decided upon the principle that the conduct of one party to the contract in using it before the happening of the condition constituted a fraud upon the other party. The Michaels case in its last paragraph expressly so states, while the others involve it by necessary implication.

(2) Counsel for appellees lays some stress upon the fact that this instrument of postponement was an "unsealed declaration," intimating that its force and solemnity is diminished by the lack of a seal. But this court will be familiar with the fact that under the Spanish and Porto Rican law seals are unknown, the solemnity imported by a sealed instrument under the common law being supplied by the notarial execution, thereby constituting it a "public instrument," as required by the Mortgage law and section 1247 of the Civil Code quoted on page 47, *ante*. This is a sufficient answer to the contention that the instrument referred to failed to alter the rights of the parties because it "could have no such effect."

(3) The foregoing also disposes of the contention that said instrument "whether fraudulently conceived or not is a worthless and inoperative paper," which position counsel further supports by the statement that "appellants have never pretended to any title to the leasehold in question except under the instrument of postponement."

In this counsel is under a grave misapprehension. We have always claimed that the leasehold survived the foreclosure and still exists by virtue of its express recognition in the foreclosure decree, which was referred to in our brief and appears on pages 40 to 45 of the printed record. The ancestor of appellants was in possession of his 279 cuerdas under this lease, of the original existence and validity of which there is no doubt and the burden is upon the appel-

lees to prove the subsequent extinguishment thereof either by the foreclosure or by voiding "the instrument of postponement," hence the necessity of a cross-bill on their part.

(4) Counsel further asserts that our brief is "largely devoted to characterizations of the instrument of postponement as a fraudulent and iniquitous device." On the contrary, we contend that the said instrument was a wholly innocent, ordinary and *bona fide* document having the exact effect which its terms import. What we do characterize as fraudulent and iniquitous is the *purpose* with which appellees assert said instrument was designed. Counsel says there is nothing to indicate such a purpose. This issue is the very gist of the controversy, and, as we claim, the fraud to be in the very facts alleged by the appellees themselves and found by the court below to have been proven, the question for the determination of this court is clearly defined.

(5) Counsel again says that appellants "take the high ground that, being equally guilty with the cross-complainants of an attempt to defraud Montilla, their position as defendants to the cross-bill entitles them to defraud the cross-complainants." This is a form of statement striking in itself, but having no foundation in the record or in the attitude of appellants. Our contention is the contrary, that there was in fact no fraud on either side, but that the subsequent action in asserting that the instrument of postponement was simulated is the only false and fraudulent element in the whole transaction. Paul Van Syckel defrauded nobody and the present appeal is to prevent his heirs from being defrauded.

(6) In replying to our argument as to the error in the admission of the testimony given by the witness Acuña, counsel argued that such ruling was not reversible error because "this court cannot say that the finding of fact was not justified by other evidence in the case." In other words, the contention is that it must affirmatively appear that there was no other evidence. On the contrary we think

the rule to be that it must affirmatively appear that the evidence objected to was harmless.

Smiths *vs.* Shoemaker, 17 Wal., 630, 639.
Gilmer *vs.* Higby, 110 U. S., 407, 550.
Fidelity & Dep. Co. *vs.* Courtney, 186 U. S., 345, 351.

It has certainly been held that, where nothing appears to the contrary, the presumption will be in equity cases that the judge considered only the evidence material and properly admissible. But in the present case there is no room for presumption, because the judge below expressly indicated, both in his opinion and the findings (R., pp. 61, 63 and 82), his dependence upon the testimony of said witness Acuña.

For the foregoing reasons we ask the court to sustain our appeal, to reverse the decrees of the court below so far as they are inconsistent with the existence, recognition, and effect of the lease of June 23, 1897, to complainant's ancestor, and to direct further proceedings not inconsistent with the law as it may be declared by this court.

N. B. K. PETTINGILL,
GEORGE H. LAMAR,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 69.

ADA ELMIRA HIRST VAN SYCKEL ET AL.

vs.

JUAN JOSE ARSUAGA ET AL.

BRIEF FOR APPELLEES.

CHARLES F. CARUSI,
Counsel for Appellees.

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Statement of Facts.

In view of the statutory findings of facts made by the court below, as well as of the opinion of the court very fully reciting the facts, there will follow only a very condensed statement intended to bring out into relief the salient features of the transaction under investigation. It may here be remarked that not only will this court under its decisions treat the findings of facts of the court below as conclusive (see *inter alia* Holloway *vs.* Dunham, 170 U. S., page 615), but attention is here particularly directed to page 64 of the record in which the trial justice comments upon the clear, unequivocal, and convincing character of the evidence upon which its principal findings were made.

It would seem that one Montilla, the owner of the plantation "Santa Cruz," had prior to June 23, 1897, mortgaged his plantation for 11,000 pesos. On June 23, 1897, about a year previously to the American occupation of Porto Rico, one Van Syckel, an American resident of Porto Rico, secured from Montilla an indeterminate and perpetual lease of the plantation for a monthly rental of 105 pesos. Under this lease Van Syckel entered into possession of the plantation and commenced a dairy business. Montilla, repenting of the bargain he had made with Van Syckel, arranged with the mortgagees to foreclose their mortgages and thus cut out the lease. From this moment the bitterest hostility began between Paul Van Syckel and Montilla. The effort to wipe out the lease was blocked by Van Syckel paying off the mortgages and substituting himself as mortgagee. This was accomplished by a litigation begun by Van Syckel in the early part of 1900 in the United States Provisional Court, which resulted in a decree that the lease was a perpetuity and that Van Syckel should have the right to pay off the mortgages and continue to hold the lease (5th finding of fact). June 1, 1900, Van Syckel formed a partnership with the appellees and sold them a half interest in the plantation and the movable property upon it used in conducting the dairy business, cattle, etc., for 15,000 pesos, the partnership capital being 30,000 pesos and consisting of the plantation itself, which was put in at a valuation of 11,724.77 pesos, and the other property mentioned. The following January Van Syckel went to live in Havana, Cuba, and the dairy business was conducted by the firm of Van Syckel & Company.

Notwithstanding the adjudication above referred to in favor of Van Syckel and against Montilla, the latter appealed and began a series of persistent litigations, first against Van Syckel, and then against his successors in interest, P. Van Syckel & Company, which continued until December 30, 1905, when an appeal pending in the Supreme Court of the United States was dismissed and all differences settled by the payment to Montilla of 2,500 dollars in cash

by Paul Van Syckel & Company (13th finding). Sometime after the departure of Van Syckel for Havana and about six weeks before an action begun by P. Van Syckel & Company to foreclose the mortgage liens, which together with the leasehold had become a part of their partnership capital, a written instrument dated July 27, 1901, was filed whereby it was agreed that "all and whatever rights of preference the real rights of mortgage, of which review has been made, constituted over the plantation of "Santa Cruz," described, have or may have for all cases, including that of judicial claim, all these they postpone to the real right of lease mentioned in favor of Mr. Paul Van Syckel and his—(*causa habientes*) renouncing the right which they may have to ask for the recision of said lease" (Record, page 19). This document referred to as the instrument of postponement, the court finds to have been executed and recorded for the sole and single purpose of a muniment of defense against Montilla in case he should reverse the decision previously referred to by which Van Syckel became the owner of the mortgage rights assigned by him to the firm (findings 12, 13, 14, and 15). It was by the same findings established that the said instrument was never intended to become operative between the parties except in the event of the contingency above named, which the evidence also disclosed never arose, Montilla not having succeeded in his attempt to redeem the mortgages, and a compromise with him having finally settled the controversy.

ARGUMENT.

The first seven assignments of error are addressed to the same two general propositions urged below by the appellants and there decided against them.

These are (1) that evidence was inadmissible to vary or impeach the instrument of postponement; (2) that the document was intended as a fraud upon Montilla, and for that reason, if none other, equity should not interfere to cancel it. If these arguments were sound, the situation would have been this: Paul Van Syckel, after capitalizing a dairy business consisting of a plantation and the cattle and utensils upon it at $30,000, and having sold his partners a half interest for $15,000 cash, to which sum must also be added one-half of the $2,500 paid in settlement to Montilla, would have had the right at the end of two years, when the partnership first expired by its own limitations, to decline to renew it, and to himself enter into possession of "Santa Cruz" as lessee of the firm and pay his partners one-half of 105 pesos monthly rental. It hardly needed evidence to convince the court below that no such situation was ever in contemplation of the partners whether at the time the partnership was originally formed, or renewed, nor when the "instrument of postponement" was executed.

The court, however, has found upon evidence, which in its opinion (Record, page 64) it characterizes as "clear, unequivocal and convincing," that the lease was to have no life as between the partners in their accounting during or after the date of the partnership.

It, the "instrument of postponement," was not intended to be operative between the parties except upon a contingency which never arose, and then only for their protection against Montilla (fifteenth finding, Record, page 83). The first contention of the appellants as to the admissibility of evidence to vary or impeach the instrument of postpone-

ment is disposed of by the repeated decisions of this court that evidence is always admissible to prevent the fraudulent use of a written instrument by showing that it was not intended to be operative between the immediate parties.

Michels *vs.* Olmstead, 157 U. S., 196.
Burke *vs.* Dulaney, 153 U. S., 228.
Hartford Fire Ins. Co. *vs.* Wilson, 187 U. S., 467.

The second contention involves the application of the maxim that one must come into equity with clean hands. As the fraud relied upon by the appellants is alleged to center in the execution of the "instrument of postponement," the court is asked to examine that instrument which is set out in full at pages 17, 18, and 19 of the record. It appears to be a signed but *unsealed* declaration of the parties that whatever rights of preference the real rights of mortgage might have over the lease executed by Montilla to Paul Van Syckel the partners agreed to renounce in favor of Paul Van Syckel individually. A significant expression, found in the very clause under discussion, is "including that of judicial claim." Almost immediately after the execution of this "nude pact" the firm foreclosed its mortgages, with the result that the leasehold was wiped out unless the "instrument of postponement" could in some way have prevented it. Leaving aside the question as to whether prior to the execution of the "instrument of postponement" the leasehold interest constituted a part of the partnership assets, and also the question as to whether an instrument under seal or upon some valuable consideration might have been effective to make a subsequent lease owned individually take priority over an antecedent mortgage owned by the partnership and constituting its principal asset, leaving these questions aside, it is clear that as between the partners themselves the "instrument of postponement" being wholly without consideration could have no such effect, and that too independently of the real intention of the parties which, from the finding and opinion of the court, appears to have been that it might

prove advantageous in the firm's litigation with Montilla that the lease should be preserved from merger in the foreclosure proceedings and be held by Paul Van Syckel individually as trustee for the firm.

It is difficult to see what advantage Van Syckel & Company secured by the execution of this instrument. Whether fraudulently conceived or not it is a worthless and inoperative paper. If the court leaves the parties where it finds them, it finds the fee-simple title under the foreclosure in the partnership. In directing the cancellation of the instrument the court at best committed non-prejudicial error, as no title could pass under it or claim of right be founded upon it, and that independently of any estoppel against any of the parties to it or those claiming under them. The appellants have never pretended to any title to the leasehold in question except under the instrument of postponement. If that instrument is wholly inadequate to convey any title to them, the cancellation of the document is unimportant and the partnership property must be divided as provided by the decree below. The appellees as honorable men are interested, however, in having squarely decided an issue reflecting upon their characters and integrity. In this aspect a charge of fraud is always material. The court below by the sixteenth finding (Record, page 83) clears the appellees of this charge and vindicates the memory of the deceased father and husband of the appellants. The brief filed on behalf of the appellants is largely devoted to characterizations of the "instrument of postponement" as a fraudulent and iniquitous device, yet nowhere is the reader enlightened as to the nature of the fraud sought to be practiced upon Montilla or the courts. The court below could not find it, counsel have puzzled over it and if the appellants are in the secret they have kept it. It assuredly could constitute no fraud upon Montilla that the lease executed by him should be kept alive and binding upon him, in the event the foreclosure of the mortgages was set aside and he be given the right to redeem them.

But one thing more remains to be said under this head. Whether the appellants knew, at the time of filing their bill, of the agreement between the partners that the "instrument of postponement" should not be operative between them is, of course, conjectural. The existence of such an understanding was the principal issue in the case below, and the trial justice certifies, at page 89, folio 116, of the record, that the correspondence between Paul Van Syckel and the appellees was admitted in evidence by him as material to the issues. The correspondence itself is not set out in the record, and the knowledge of the appellants from the correspondence of Paul Van Syckel must remain conjectural. That, however, is of minor importance. They are here now in the Supreme Court of the United States asking this court to ignore the fact established by "clear, unequivocal and convincing evidence" that the instrument of postponement was not intended to be operative between the partners themselves, and to reverse the decree of the court below to the end that they may practice a fraud upon the appellees under cover of certain rules of evidence and of the maxim *in pari delicto potior est conditio defendentis*. As complainants below they ask the court to make an equitable distribution of partnership assets, but inasmuch as to that end the defendants below asked the affirmative relief that the instrument of postponement be declared a nullity, they take the high ground that being equally guilty with the cross-complainants of an attempt to defraud Montilla, their position as defendants to the cross-bill entitles them to defraud the cross-complainants. It is not believed that the decisions of this court cited in appellants' brief, filed on the first hearing of this cause, pages 34-39, are authority for such a view, nor that it is one which this court may be expected to sanction.

The Eighth Assignment of Error.

This assignment of error is based upon the alleged error committed by the court in permitting Señor Acuna to testify as to communications made by Paul Van Syckel and the appellees to him as their joint attorney.

The rule cannot be better stated than was done by the court below in overruling this objection (Record, page 86, folio 112): "It is well settled that when an attorney is employed by two persons to perform professional services jointly for them and the clients afterward get into dispute about it between themselves, communications made to the attorney at the time of the employment by either of them in the presence of the other are not privileged and either of the parties in the subsequent litigation between themselves can even compel the attorney to testify without the consent of the other joint employer."

Wigmore in his note to section 2312 of his work on evidence, volume 4, page 3235, states the rule as above and puts it on the ground that common interest and employment forbade concealment by either party from the other and that therefore such statements are not privileged between the original parties, and citing *inter alia*.

1877. Hebbard *vs.* Haughian, 70 N. Y., 54 (an attorney employed to draw a deed is competent to testify as to the directions received by him from the parties and as to the transaction between them at the time).

1901. Doheany *vs.* Lacy, 160 *Id.*, 213.

1888. Michael *vs.* Foil, 100 N. C., 178.

1888. Goodwin's Appeal, 117 Pa., 514.

1856. Parish *vs.* Gates, 29 Ala., 254, 260.

1889. Bauer's Estate, 79 Cal., 304, 312.

1896. Murphy *vs.* Waterhouse, 113 *Id.*, 467.

1885. Lynn *vs.* Lyerle, 113 Ill., 128, 134.

1888. Tyler *vs.* Tyler, 162 *Id.*, 525, 541.

1900. Funk *vs.* Mohr, 185 *Id.*, 385 (an attorney allowed to testify to the construction put by him on a contract made by him for one party with the other).
1887. Hanlon *vs.* Doherty, 109 Ind., 37.
1888. Colt *vs.* McConnell, 116 *Id.*, 256.
1895. Wyland *vs.* Griffith, 96 Ia., 24.
1901. Taylor *vs.* Roulstone, 61 S. W., 354.
1902. Thompson *vs.* Cashman, 181 Mass., 36.
1886. Cady *vs.* Walker, 62 Mich., 157.
1901. Shove *vs.* Martine, 85 Minn., 29.
1898. Adler *vs.* Helman, 55 Neb., 266.
1903. Yahnke *vs.* State, 94 N. W., 158.
1895. Livingston *vs.* Wagner, 23 Nev., 53.
1854. Gulick *vs.* Gulick, 38 N. J. Equity, 402.
1864. Whiting *vs.* Barney, 30 N. Y., 330.

Further, even if the court's ruling were held to be wrong, no reversal could follow on this defective record.

The one essential fact in this case upon which the equitable relief of cancellation was predicated was the intent and purpose of the execution of the "instrument of postponement."

The evidence not being set out in the record and it nowhere appearing that Acuna's testimony was the only evidence upon this point, this court cannot say that the finding of fact was not justified by other evidence in the case. The evidence appears to have consisted of oral testimony before the court, numerous documents and a number of letters which passed between Paul Van Syckel and the appellees. Of these letters a large number were admitted without objection. It is highly probable that this correspondence alone, which the trial justice certifies (page 89, folio 116) he considered as material to his findings, would have justified the court's finding and made Acuna's testimony merely cumulative and any error in its admission entirely non-prejudicial (Record, pages 88, 89).

The burden is upon the appellants to show that without the alleged erroneously admitted evidence the findings of fact supporting the decree would not or should not have been made. This they have failed to do.

Respectfully submitted,

CHARLES F. CARUSI,
Counsel for Appellees.